LEGAL, POLITICAL, AND PRACTICAL OBSTACLES TO COMPLIANCE WITH THE COSTA RICAN LABOR CODE

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INTRODUCTION

1. Historical background on the labor movement

Without going into too much detail regarding historical background, which can be found in a variety of other studies, it is interesting to briefly look at the history of the Costa Rican labor movement.

The first labor movement in Costa Rica emerged during the construction of the railroad to the Atlantic, with a 1888 strike led by Italian immigrants. It is also worth noting that an "Artisan Society" was constituted in 1874 by a freemason priest named Francisco Calvo (de la Cruz, 41 and 61).

The popular social movement, tied to the labor struggles, advanced significantly with the creation of the Independent Democratic Party in 1893. Later there were other important achievements, such as Priest Jorge Volio's leadership of the "Social Justice" newspaper and the 1901 creation of the "Worker's League" (de la Cruz, 25, 34, 67). Several years later, thinker Omar Dengo helped create the "Centro Germinal" which gave birth to the General Workers' Confederation in 1913. The Confederation was created under the influence of the beliefs of Spanish anarchist unionists. It led important struggles to support social proposals developed by people who were concerned about the reality of the country. All of these people and entities worked together on the first Workers' Day march on May 1, 1913 (de la Cruz, 85).

Over the next several years, the social, labor, and popular movements developed further through a variety of political parties and workers' associations. It was in this context that different instances of popular and labor organization occurred, including the struggle to overthrow General Tinoco in 1919, the banana sector strike of 1921, and the foundation of the Communist Party in June 1931 (de la Cruz, 236-).

The workers' movement developed an ideology different from that of the capitalist classes. Some of the triggers for the social explosion that followed were the repression of the working class and the violation of national sovereignty that occurred in the banana plantations after the famous contract law Soto-Keith in the late 19th century.

The development of the Costa Rican social movement (as an expression of fundamental changes in the world and in the national reality) led to new demands from the workers' movement as well as drastic reactions and repression from the powerful sectors. A conspicuous example of these power dynamics was the 1943 Constitutional reform that provoked fundamental changes to benefit workers, despite the reactions from the more conservative sectors.

One of the factors that best explains the anti-union actions that have occurred throughout Costa Rican history is the fact that unions not only emerged (according to the powerful sectors) because of large companies' unlimited thirst for wealth, especially foreign companies (remember the banana strike from the 1920s or the anarchist rhetoric of the first

General Workers' Confederation in 1913), but also because the Communist Party considered them an effective tool.

In the mid 1900s, when the workers' struggle in the banana regions was gaining support, the banana companies and other representatives of powerful economic interests perpetrated more systematic attacks on unions. The workers' organizations extended their reach to the fieldworkers who fought against the latifundio and struggled to defend their land and occupy unused areas (Abarca, 31-70). The banana companies and large landowners fought to eliminate these popular organizations. It is in this context that *sindicalismo* emerged, though it became stronger in the 1980s.

The *Solidaristas* define their movement as a "spiritualist ideology with economic and social repercussions that aims to abolish the concept of 'class' through the articulation of workers and employers" (Rivera, 61).

The way this type of structure traditionally functioned (before the Law on Protection of the Worker N° 7983, from February 16, 2000) was through a fund that included contributions from both employers and workers. The employer donated the percentage he would pay for support in the case that the worker was dismissed, and the worker contributed using his own salary as if the fund were a personal savings account. The 2000 law made some changes in this practice, because the employer's contribution is now deposited in the existing pension funds.

Traditionally, this contribution scheme was the most attractive thing that these entities offered, and it represented a real advantage over unionism, in economic terms. As a result, in the 1980s *solidarismo* experienced a rare boom because it could be a financial structure for both the worker and the boss, and this instilled the discourse of "conflict resolution through dialogue and negotiation" (Rivera, 58).

Over time it became clear that the business owners intended to use this structure to obstruct union organizing. In the first place, the employer's contribution should have been 8.33% of the worker's monthly salary, but the employers were actually contributing less. At the same time, if the employers' contributions ultimately ended up in the hands of the workers, all of the resources really belonged to them (Rivera, 60). Nevertheless, the employers have always had a heavy and determinant influence in the Solidarity Associations.

In the early 1900s, the idea of unionizing became more common in Costa Rica. The first structured manifestations of unionization occurred with the struggles of the shoemakers in the capital city, and then with the 1934 strike at the banana plantations owned by the United Fruit Company. This strike defined many of the practical elements of the Costa Rican union movement and raised awareness about unions among workers in the banana sector. After the political events of 1948, when there was severe repression of the Communist movement (whose consequences appeared in clause 98 of the Constitution which for many years prevented sympathizers with these practices from organizing political parties). This is the national context, reflecting the events of the Cold War, where the ideas of *solidarismo* started to take hold. These ideas were first promoted on an international level in the 1960s (CEDAL, ASEPROLA, 1989: 12-57).

After establishing itself in Costa Rica, *solidarismo* began to penetrate other Latin American countries. Efforts to establish *solidarismo* happened in Honduras in 1983, Guatemala in 1984, El Salvador in 1987, and Panama and Nicaragua in 1988. Later there were also some efforts in Belize. The Latin American Solidarity Council (CLS) was created in 1992, and was later renamed the Inter American Solidarity Council (CIS).[1]

The Constitutional basis for these organizations is found in Article 25 (Hernandez, 28), but given that this reference is made in the context of comparing solidarity organizations with unions, it should be noted that not only does the system not give any Constitutional status to *solidarismo,* but also this type of "union of persons" is based on individual rights (Clause 25 of the Constitution guarantees individuals certain rights and guarantees) while the right to freedom of association is a collective right. That is to say, that a mechanism for recognizing *solidarismo* as a Constitutional entity would make it possible to do the same for all similarly structured organizations, without concern for their objectives. That would mean denying the history of the right to work "as a determining factor in the modern conception of recognizing that collective rights are fundamental human rights" (Villasimil, 79).

The fundamental role of *solidarismo* in the 1980s is seen especially in the banana plantations where unions had previously been influential. One strategy used to impede union activism was interfering with union's ability to negotiate. Negotiation was replaced by *arreglo directo,* which does not have the legal force to deal with the problems that can be addressed by a collective bargaining agreement. *Arreglo directo* refers to a direct agreement between employers and workers that becomes necessary as a result of a conflict (Rivera, 64).

The strategic objective of *solidarismo* was to prevent workers from collectively defending their interests. The promotion of direct accords in the banana plantations prevented workers from including other plantations and regions in their demands.

The conditions that allowed the development of *solidarismo* (aside from the efforts of the ultra-conservative members of the Catholic Church and the anti-union business owners) include the following:

a) The idea that unemployment leaves many workers waiting for job opportunities, in conditions where it is easier for the worker to sell his conscience to *solidarismo* than to suffer unemployment and be unable to support his family;
b) The incorporation into the labor ideology of the need for collaboration between the classes and the elimination of "hate, class wars, strikes and sabotage" according to the Official Guide to the Costa Rican Solidarity Movement 1986-1987;
c) *Solidarismo* is a worker-employer movement dominated by business ideology. The two sectors are linked, but not unified;

[1] More information on *solidarismo* can be found at http://www.aseprola.org/documentos/solidarismo/solidarismo.htm

d) The union organization, which exclusively defended the rights of workers and therefore was opposed to the interests of the employers, is replaced by an organization that attempts to reconcile workers' interests with employers' strategies for maximizing profits;
e) *Solidarismo's* complicity with the repression of unions, by justifying or not opposing the dismissals of union leaders, and promoting resignation from unions by making union membership incompatible with solidarity membership;
f) Workers' social progress is touted by the business rhetoric, but this does not imply workers' possession of the means of production; and
g) The certainty that *solidarismo's* high chances for success result from the coherence of its organizational and ideological profile and the support of employers (Rivera, 60-63, 132).

The union movement complained that *solidarismo* prevented freedom of association and implied employers' control over workers' organizations, and filed complaints against the Costa Rican government before the International Labor Organization (ILO).

The ILO's Committee on Freedom of Association formulated recommendations in late 1991 after reviewing case 1483. The recommendations stated that it was inappropriate for solidarity associations to occupy the spaces designated for workers' organizations. As a result, measures were taken to try to eradicate *solidarismo* (Blanco, 2).

In 1993, Law 7360 was issued, which added to the Labor Code clauses regarding freedom of association. At the same time, the Constitutional court issued sentence 5000-93, which aimed to protect job stability not only for union leaders but also for affiliated workers.

The legal reforms meant that solidarity organizations were prohibited from making collective bargaining agreements or direct accords. Surprisingly, however, unions were also prohibited from carrying out their anti-*solidarismo* activities (Blanco, 9). Apparently the unions were being protected only to be subsequently repressed. The 1993 legal reforms did not prevent solidarity associations from acting against unions.

2. THE NATIONAL ECONOMY AND ITS RELATIONSHIP TO THE GLOBALIZED ECONOMY

Although Costa Rica, along with the other Central American countries, is currently negotiating a free trade agreement (FTA) with the United States (CAFTA), Costa Rica has already been incorporated to some degree in the "globalized economy".

Aiming to open trade and find preferential markets for its goods and services, Costa Rica joined the World Trade Organization in 1990 and has signed free trade agreements with Mexico, Chile, the Dominican Republic, and Canada. Costa Rica is also working on a free trade agreement with the Caribbean Community (CARICOM) and is establishing contacts in Asia. In September 2003 the seven Central American countries finished the negotiations for a political agreement with the European Union, and they hope to start discussing a trade agreement in 2004.

The trade agreements with Mexico and Chile went into effect in 1995 and 2001, respectively. The agreement with Canada went into effect in November 2002.

The Costa Rican economy, like the rest of the Central American economies, suffered a decline in 2001 as a result of both the falling international prices on export products like coffee and the decreasing international demand, especially from the US, for products like Intel technology. In addition, the terrorist attacks on the US on September 11 led to a decrease in the number of tourists visiting Costa Rica. These events showed the vulnerability of the Central American economies and their dependence on the US market. These factors encouraged the development of new production and trade structures.

In this context, it appeared that the negotiation of multilateral or bilateral trade agreements was the only option. The international economic order imposed by wealthy countries creates regional economies that are easy to access, based on agreements that identify negotiable products and exclude others. Negotiations are not always balanced, and the more developed countries make sure that their strategic interests predominate.

With an economy dependent on the world's largest economy (the US), Costa Rica began an irreversible process of negotiating trade agreements. Internally, there have been complaints of a dangerous lack of transparency and the strong interference of different economically powerful sectors that seek to benefit most from the FTAs. These factors create an increasingly unequal economic structure that makes it difficult to achieve the "adequate distribution of wealth" referred to by Article 50 of the Constitution.

The free trade agreement that Costa Rica finished negotiating with CARICOM on March 14, 2003 will probably be signed in November 2003 by the Ministers. CARICOM includes 15 countries: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Guyana, Haiti, Jamaica, Montserrat, San Cristóbal and Nevis, Santa Lucía, San Vicente and the Grenadines, Surinam, and Trinidad and Tobago. After Costa Rica negotiated an FTA with Trinidad and Tobago, that country had to consult with CARICOM, due to an internal regulation. The other Caribbean states, with the exception of Haiti, decided to ask for an extension of the FTA to the whole group. The Dominican Republic will also begin negotiations in January 2004 to join CAFTA.

The opinions regarding the results of CAFTA vary. While some say that it is the most important trade advancement in the history of Costa Rica, and that it will create a secure context for the development of various economic sectors (in contrast to the uncertain instrument of the ICC "Iniciativa de la Cuenca del Caribe"), others criticize the impenetrable nature of the negotiations and are distrustful of the national negotiators. Certain products are excluded, in order to protect vulnerable economic sectors that have few possibilities of transforming themselves in the face of the competitive global market. Some people say that these exclusions have a social cost, because they prevent the poorer sectors from accessing better prices.

The following table presents a historical analysis of the Costa Rican economy, according to data from the State of the Nation (*Estado de la Nación*) project. The table shows the

evolution of some of the most important economic indicators (exports and imports) over a ten-year period, from 1991 to 2001.

State of the Nation| **Economic Statistics**											
Years	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**
Exports (Millions of US$)	**1,899.3**	**2,385.2**	**2,625.5**	**2,878.2**	**3,475.9**	**3,758.4**	**4,205.5**	**5,525.6**	**6,662.4**	**5,849.7**	**5,005.9**
Traditional		837.7	858.0	948.1	1,187.2	1,103.1	1,049.2	1,142.7	969.4	877.7	733.4
Non traditional		1,547.5	1,767.5	1,930.1	2,288.7	2,655.3	3,156.3	4,382.9	5,693.0	4,972.0	4,275.5
By sector											
Industrial	518.4	664.0	426.5	854.4	951.8	1,107.2	1,121.0	1,244.4	1,134.7	1,090.2	1,039.9
Agricultural	969.3	1,095.6	1,140.2	1,268.6	1,614.3	1,629.4	1,766.0	1,900.5	1,542.9	1,404.4	1,273.5
Perfeccionamiento activo	266.6	391.5	485.2	420.8	475.2	378.8	427.2	444.5	396.1	398.9	359.2
Export processing zones	145.0	234.1	273.6	343.4	434.6	643.0	891.3	1,936.2	3,588.8	2,956.3	2,333.2
By Destination (millions of US$)											
MCCA	177.7	248.4	267.9	288.1	349.8	385.4	412.5	482.2	531.9	557.5	559.0
Rest of the world	1,309.8	1,511.2	1,598.8	1,825.8	2,216.3	2,351.3	2,474.5	2,662.7	2,145.6	1,937.0	1,754.5
Years	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**
Imports (Millions of US$)	**2,308.4**	**2,949.0**	**3,514.9**	**3,788.4**	4,089.5	**4,326.8**	4,969.6	**6,238.7**	6,354.6	6,388.6	6,564.3
Primary materials	1,253.5	1462.8	1,676.6	1,932.6	1,244.6	1,282.5	2,666.0	3,294.7	3,566.9	3,493.9	3,663.9
Capital goods	424.8	608.3	779.1	679.4	728.2	709.6	878.6	1,225.9	1,148.6	1,079.5	1,024.9
Final (consumer) goods	478.0	718.6	885.1	973.1	915.9	1,096.0	1,203.0	1,457.3	1,318.9	1,343.1	1,465.0
Fuel and lubricants	152.1	159.3	174.1	203.3	200.8	238.7	222.0	260.8	320.2	472.1	410.5

Source: State of the Nation. 2002

This table shows the decline in the Costa Rican economy beginning in 2001. As we explained earlier, this is due to the fall in international prices for some traditional export products. At the same time, Intel, which played an important role in the national economy, experienced a decline in sales, and tourism decreased (the latter as a result of the September 11 terrorist attacks on the US).

The next table shows the oscillating exchange rate for the colon with respect to the US dollar. Various Costa Rican sectors have spent several years discussing the undervaluation of foreign currency, which they say affects the country's economy, because the false value of the national money prevents Costa Rica from competing with other countries. What is certain is that an abrupt change in the exchange rate (if we accept the theory of dea of undervaluation) would affect wage earners because it would increase the costs of essential products, public services, and collective transportation.

Exchange rate. 2000 – 2003.
(Colones per dollar on the last day of the month)

Month	2000	2001	2002	2003
JANUARY	299,95	320,02	344,79	382,33

FEBRUARY	301,67	321,57	347,57	385,55
MARCH	303,55	323,45	350,39	388,83
APRIL	304,92	324,71	353,25	391,99
MAY	306,63	326,54	356,74	395,44
JUNE	308,42	328,35	359,79	398,59
JULY	310,00	330,38	363,08	402,22
AUGUST	311,74	332,36	366,11	405,55
SEPTEMBER	313,35	334,58	369,12	
OCTOBER	315,01	336,96	372,64	
NOVEMBER	316,79	339,56	375,88	
DECEMBER	318,30	340,21	379,05	

Source: Banco Central de Costa Rica.

In terms of the Economically Active Population (EAP), data from the Estado de la Nación show that this included 1,065,701 people in 1991 and had risen by 155,213 by 1996. In 2001, the total was 1,653,321 workers. These statistics show that the EAP has increased by 64% in ten years.

Unemployment has increased over the years, shown in the next table. A 2003 ILO study on showed an increase in urban unemployment, especially since 1996.

Years	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**
(Percentages)											
Open unemployment	**5.5**	**4.1**	**4.1**	**4.2**	**5.2**	**6.2**	**5.7**	**5.6**	**6.0**	**5.2**	**6.1**
By zone											
Urban	6.0	4.3	4.0	4.3	5.7	6.6	5.9	5.4	6.2	5.3	5.8
Rural	5.2	3.8	4.2	4.1	4.7	5.9	5.6	5.7	5.8	5.1	6.5
By gender											
Men	4.8	3.5	3.6	3.5	4.6	5.3	4.9	4.4	4.9	4.4	5.2
Women	7.4	5.4	5.3	5.8	6.5	8.3	7.5	8.0	8.2	6.8	7.6

Source: Estado de la Nación. 2002

Although in general terms unemployment is a problem in both urban and rural areas, in recent years there have been more job opportunities in the urban areas.

Year	**1991**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**
Workforce	**1,065,701**	**1,187,005**	**1,231,572**	**1,220,914**	**1,301,625**	**1,376,540**	**1,383,452**	**1,535,392**	**1,653,321**
Urban	485,628	551,198	573,239	561,290	594,753	629,709	683,293	2,249,301	2,305,723
Rural	580,073	635,807	658,333	659,624	706,872	746,831	700,159	1,560,886	1,601,019

Men	746,916	829,883	856,299	853,394	892,647	928,056	925,223	1,024,301	1,068,789
Women	318,785	357,122	375,273	367,520	408,978	448,484	458,229	511,091	584,532

Source: Estado de la Nación. 2002

The gender comparison shows a significant difference in unemployment rates between women and men. This difference has been particularly noticeable since 1996. The 2003 ILO study compares unemployment according to gender in urban areas, where there is still a notable difference, though not as severe. Although in the early 1990s this difference was large, the gap closed later in the decade.

TABLE 1-A

LATIN AMERICA AND THE CARIBBEAN:
OPEN UNEMPLOYMENT IN URBAN AREAS 1985-2003

(AVERAGE ANNUAL RATES)

Country	**1985**	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**	**2002**	**2003**
(·)																
Costa Rica	7.2	5.4	6.0	4.3	4.0	4.3	5.2	6.2	5.7	5.6	6.0	5.2	6.1	6.8	**6.8**	**6.7**

(·) **Up to the third trimester (corresponds to the month of July)**
Nacional urbano.
Source: Elaboración OIT, con base en información de las Encuestas de Hogares de los países.
Source: OIT, con base en datos oficiales nacionales.

TABLE 2-A

LATIN AMERICA AND THE CARIBBEAN:
OPEN UNEMPLOYMENT BY GENDER 1990-2003

(Annual rates)

Country	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**	**2002**	**2003**
Costa Rica	5.4	6.0	4.3	4.0	4.3	5.7	6.5	5.9	5.4	6.0	5.3	6.1	6.8	**6.8**	**6.7**
Men	4.9	1.8	1.2	0.9	3.8	5.4	6.0	5.4	4.6	4.9	4.6	5.5	6.2	**6.2**	**6.1**
Women	6.2	13.3	9.9	9.7	5.1	6.2	7.6	6.8	6.7	8.2	6.4	7.0	7.7	**7.7**	**7.6**

Up to the third trimester (corresponds to the month of July)
Nacional urbano.
Source: Elaboración OIT, con base en información de las Encuestas de Hogares de los países.
Source: OIT, con base en datos oficiales nacionales.

These tables show that rural women suffer most from unemployment. At the same time, unemployment of all groups is increasing.

The next table compares employment data from different productive sectors. These figures are only available to 1999. The agricultural sector has stagnated, while commerce and services have grown. The industrial sector has also stagnated, as shown by a decrease in its workforce. These figures show to some degree how the Costa Rican labor norms marginalize agricultural work.

Year	1991	1993	1994	1995	1996	1997	1998	1999
Workforce	**1,065,701**	**1,143,324**	**1,187,005**	**1,231,572**	**1,220,914**	**1,301,625**	**1,376,540**	**1,383,452**
Agriculture	264,804	256,816	252,232	260,970	259,032	263,385	270,781	270,843
Mining	1,531	1,789	2,160	2,713	2,301	1,520	1,646	2,299
Industry	201,964	204,943	212,947	202,738	202,128	203,859	216,005	217,024
Basic services (electricity, gas, water)	11,735	15,954	17,096	12,578	12,373	14,136	13,278	13,562
Construction	69,197	70,814	78,572	79,809	71,448	89,132	89,151	89,514
Commerce	165,621	204,078	218,367	239,158	238,963	249,235	267,062	286,558
Transportation, communication	46,023	53,257	60,190	64,362	61,598	67,218	75,217	77,004
Financial establishments	38,514	47,488	51,515	51,818	51,916	64,095	73,695	68,580
Services	247,110	267,604	276,626	298,086	296,741	328,023	346,403	338,731
Activities not well specified	9,981	13,952	10,741	10,221	11,146	8,593	11,211	7,344
Seeking a first job	9,221	6,629	6,559	9,119	13,268	12,429	12,091	11,993

Source: State of the Nation. 2002

Finally, we also have data comparing employment in the public and private sectors. Clearly the private sector has a greater need for labor. In the mid 1990s when Costa Rica started to have "labor mobility" policies in the public administration, it no longer had a stable number of employees. Despite the fact that State activities have been important for the country's institutional life over the years (need for more coverage on education, health, and other services, due to the growing population and the goal of improving citizen's quality of life) this has not been reflected in increased employment (including the whole public sector: the central government, autonomous and municipal entities).

Years	1991	1994	1995	1996	1997	1998	1999	2000	2001
Work-force	**1,065,701**	**1,187,005**	**1,231,572**	**1,220,914**	**1,301,625**	**1,376,540**	**1,383,452**	**1,535,392**	**1,653,321**
Private sector	890,744	999,409	1,043,123	1,033,650	1,108,173	1,169,525	1,196,858	1,297,551	1,407,635
Intl orgs	2,457	2,629	2,448	2,030	1,383	3,577	2,828	1,990	2,533
Un-known	137	524	506	360	537	1,187			75
Seeking first job	9,221	6,559	9,119	13,268	12,429	12,091	11,993	12,993	15,924
Central govern-ment	77,587	81,692	78,719	81,306	88,295	89,914	84,964	109,740	108,547
Auton. and semi-auton. institut.	78,252	88,384	90,123	83,300	80,729	92,261	78,693	101,329	107,348
Munici-pality	7,303	7,808	7,534	7,000	10,079	7,985	8,116	11,789	11,259

Source: State of the Nation. 2002

Although CEPAL's 2003 study showed that Costa Rica, along with three other countries, was one of the economies in the region that grew more than 3%,[2] in fact the only way to achieve sustainable growth is through controlled monetary and fiscal policies and more competitive exchange rates. These two factors are the main stumbling blocks facing the Costa Rican economy. As we pointed out earlier, the nation is experiencing an undervaluation of the exchange rate, and fiscal adjustments are still being discussed in the legislative arena.

In terms of social variables and economic conditions, we must conclude that the apparently positive economic figures have not led to significant improvements in social conditions (as evidenced, for example, by the unemployment levels) nor are there indications of changes in the system's ideology. Women continue to suffer particularly high unemployment levels, and rural workers continue to earn salaries that do not cover the basic cost of living. Even though the press claims that "Costa Rica and Chile are two Latin American countries that have shown progress on labor issues in the past year,"[3] the truth is that this is shown to be an exaggeration if compared with the reality of factors such as freedom of association, and the percentage of workers affiliated to unions.

3. FOREIGN INVESTMENT IN COSTA RICA

In September 2003, US Trade Representative Robert Zoellick said that Costa Rica could be excluded from CAFTA if it did not open up its telecommunications sector. The other important factor that could influence conditions in Costa Rica in the context of the CAFTA discussion is that the transnational Intel is talking about the advisability of changing working shifts in Costa Rica, so that it would be possible to work more than 8 hours in a row followed by shifts off.

These two arguments are the product of the aspirations that external sectors (and some internal sectors tied to transnational interests) always have for the dependent economies. One the one hand, they want strategic sectors like telecommunications to be turned over to some of the few transnationals that have divided up the global market (and that have appropriated this sector in each of the Latin American countries that has permitted it), and on the other hand, there is a desire to achieve a workforce flexibility with no judicial obstacles to their productive strategies.

Costa Rica will receive $415 million (170,665 colones at the current exchange rate) in foreign direct investment in 2004, according to representatives from the export processing zones (La Nacion Oct 21, 2003). This estimate is lower than the $641 million that the country is said to have received in 2002. The 2004 calculation does not include the $100 million that Intel will invest. Of the total estimate, about 60 percent ($249 million) will come from the US, according to the Asociación de Empresas de Zonas Francas de Costa Rica (Azofras).

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[2] http://www.geocities.com/lospobresdelatierra/nuestramerica/informecepal03.html
[3] La Nación Digital: http://www.nacion.com/ln_ee/2004/enero/08/pais3.html

The Azofras figures agree with those of the Central Bank. In its 2004 monetary program, the Bank estimated that incoming investments would total about $412 million. Historically, an average of 45% of the foreign investment goes to the export processing zones. Between 1997 and 2002, Costa Rica received a total of $2.892 billion in foreign investment, according to Azofras, which cited the Central Bank's fifth report on foreign direct investment. During those years, the export processing zones absorbed $1.316 billion, making it the most attractive sector for foreign direct investment.

Since 1997, the US has been the main point of origin for investment in Costa Rica. Its participation has varied from 79% in 1998, when Intel finished installing its first plants in Costa Rica, to 54% in 2002. After the US, the other main countries of origin for investment have been Canada, Mexico, Panama, and El Salvador. Data from the Ministry of Foreign Trade indicate that in 2002, Costa Rica received $80 million in investment from Canada, $12 million from Panama, $9 million from Mexico, and $12 million from El Salvador.

The following table shows the investments that have had or will have the greatest impact on the Costa Rican economy.

SOME NEW FOREIGN INVESTMENTS IN COSTA RICA 2003/2004

COMPANY	AMOUNT INVESTED	ACTIVITY
NEW INVESTMENTS		
Great Covers	$350,000	Produces car seat covers.
America Trading	$7,000,000	Dehydration of alcohol
Language Line	$550,000	Call center for simultaneous translation
Aqua Cool Dispenser	$350,000	Water processing plant
Sinergy SD	$350,000	Consulting on the opening of markets
Liberty Growers	$500,000	Wood treatment plant
Vitec	$500,000	Assembling tripods for cameras
Baan	$150,000	Regional support center
Ryan Trading	$500,000	Making and coating metallic parts for telecommunications
Novacept	Invested amount unknown.	Medical devices used by women who have finished the maternity stage
EXPANDED INVESTMENT		
Baxter Healthcare	Announced $3 million investment	Manufacture new line of intravenous devices
Sykes	800 new jobs. Did not specify amount will invest	Technical and customer support
Merrimac	New $300,000 investment	Manufacture and assembly of electronic components
Arthrocare Corp	$1,040,000	Manufacture of surgical equipment and medical instruments
BUYOUT OF OTHER COMPANIES		
Deutsche Post World Net	Did not specify amount.	The German state mail company had 35% of the shares of the Costa Rican company Cormar. This year it acquired the remaining 65%.
Mundo Grafitti	Did not specify amount.	Company owned by the Venezuelan family

		Sultán. Bought half of the shares of Tienda La Gloria and later created Mundo La Gloria.

Source: CINDE and documentation center at La Nación. July 29, 2003. San José, Costa Rica.

Most of these companies are part of the industrial/technological sector, involving the production of equipment (car seat covers, equipment to process water and treat wood, metallic parts for telecommunications, intravenous devices and surgical equipment), assembly of parts (tripod heads for photographic cameras, electronic parts), processing (dehydration of alcohol), or services and trade (consulting on the opening of markets, regional support, translation services, marketing). Clearly the agricultural sector does not attract significant amounts of investment.

The multinational Intel used its announcement of $110 million in new investment in Costa Rica to propose the need to make certain modifications in the Costa Rican system (Oct 24, 2003, La Nación). The company will start production here of the so-called *chipset,* which are components used to support and increase the performance of microprocessors, in the third trimester of 2004. They will also continue to operate two other plants in Costa Rica, where they produce 22-25% of the company's total global production.

Starting in December 2003, Intel will start to hire 75 engineers and hundreds of technicians to assemble the chipset. They will need a total of 600 employees so that the new production line can function by mid 2004. In the fourth trimester of 2004 they will start to produce about 5 million of these components. Costa Rica competed with various Asian countries to attract this investment, and it is estimated that about 3,000 Costa Ricans (or about 0.1% of the Economically Active Population) will benefit from the new jobs.

Clearly, foreign direct investment is a determining factor in the finances of any poor economy. As a result, both politicians from powerful countries, and the heads of the transnational companies, have a heavy influence on the economic environment of a small country like Costa Rica.

The job opportunities, the wealth that the activities promise to generate, and the favorable investment climate are the incentives that motivate the changes that are being pushed. This reality (which is fictitious, because this model has not helped any poor country achieve a better balance in its political and economic systems) is what must be faced by the social sectors of poor countries.

In Costa Rica, the "Intel phenomenon" demonstrates that foreign direct investment does not necessarily lead to social equity (at least not in the short or medium term). Even though the income that the country has received from its exports has improved the economic indicators, the company's activities have not led to any changes in the country's productive system or created greater social equity. Furthermore, taking advantage of the importance of its presence in the national economy, the company is proposing that Costa Rica modify the telecommunications sector and the labor laws, in order to remain competitive in the international competition to attract investment (Oct 24, 2003, La Nación).

Historically, tropical countries have seen that foreign investment has not led to an increase in equity (especially regarding the distribution of wealth, environmental conservation, or labor rights). It does not make sense to believe that today, with an unchanged national production system, it will be any different with the new transnationals.

4. THE PUBLIC SECTOR

Labor relations in the "public sector" are those tied to the issue of public employment, the so-called "Régimen Laboral Estatutuario", and questions of "public interest".[4] It is interesting to look at the public sector when studying labor law, because the legal statutes do not cover all of the people who work in public administration (Chacon 2003).

Article 191 of the Costa Rican Constitution says that "the relations between the State and public servants will be regulated by a civil service statute." Article 112 of the General Law on Public Administration (LGAP) establishes that "administrative law will be applicable to the labor relations between the Administration and its public servants." This same law also establishes that "the labor relations of workers that do not participate in the public business of the administration, in conformity with paragraph 3 of Article 111, will be covered by labor law or commercial law, depending on the case." In order to clarify, it is important to note also that the third part of LGAP Article 111 says that "employees of the State's companies or economic services responsible for business subject to common law are not considered public servants."

Finally, part 111.1 of LGAP says that "public servants are those that provide services for the Administration or in its name and under its account...by virtue of a valid and effective act of investiture, with full independence from the imperative, representative, remunerated, permanent or public character of the respective activity..."

Thus it is administrative law that is applicable to the labor relations between the administration and its public servants, while common law (labor or commercial, but not public) governs the labor relations for workers that do not participate in the public business of the administration (Chacon 2003).

From the point of view of the current investigation, it is particularly interesting that the strongest labor organizations in the country are found in the public sector.

The issue of public contracts is also important in the CAFTA discussion. According to some sources, CAFTA addresses this point based on the proposals that each Central American country makes to the US due to the differences in their national legislations (La Nación May 5, 2003). 2003).

In terms of the economic and social context, it should be noted that in the mid 1990s there were public policies that aimed to diminish the number of public officials. These

[4] "Public interest" is understood in terms of Article 113 of LGAP: "The expression of individual interests coincident with administrative interests...taking into account values of judicial security and justice for the community and the individual without preference for mere convenience."

governmental actions were questioned and criticized because of the lack of financing and the inexistence of alternative measures that would replace the lost jobs with jobs in the private sector. The undefined character of these policies was made clear by the contradictions in their application. Initially, it was considered a voluntary mobility program. There were vigorous efforts to develop State reforms so that instead of "mobilizing" public employees so that they would leave the State arena, they would remain integrated in the public system under different categories, through the so-called "horizontal transfers" which involved moving to another position that had the same conditions but was in a different part of the State structure. This led to the new "Sociedades Anónimas Laborales" (SAL) created through Law 7407, though which many workers remained linked to the activities of the institution that previously employed them, doing jobs that were deregulated and assumed by private companies (cleaning services, security, technical jobs, etc), so that there was no longer a direct labor relationship between those workers and the State.

The lack of financing for these policies was evident in the multiple cases of thousands of workers who were left unpaid because institutions promoted the "labor mobility" idea without having a sufficient budget to pay the compensation. In these cases, although the Constitutional court ordered them to pay all of the workers, this generally happened well after the workers had left their jobs, so that it became difficult for most of the workers to recuperate the money.

Finally, the lack of alternative measures that would help open jobs in the private sector to replace jobs lost in the public sector was an issue that was looked at the time, and nevertheless the system never resolved it. Of course the authorities have always pointed to private sector growth through foreign trade or through the development of private service providers that come in to substitute for the State. One example of these initiatives is the Law Promoting Small and Medium-Sized Companies (PYMES), which was passed in 2002 as Law 8262. With this type of legislation, poor countries try to generate wealth through small enterprises. This is a mechanism commonly promoted by international organizations like the InterAmerican Development Bank (IDB), which says "the smallest companies help to reduce poverty by creating jobs, adding value, and increasing productivity in places where there are otherwise few economic opportunities."[5]

Small and medium-sized companies can represent a basic obstacle to the development of labor rights, for a variety of reasons. First, these companies generally have very few workers, and that is an impediment to organization. These companies sometimes use child labor, very flexible and changing work shifts, and unfavorable salaries. Article 3 of the PYMES law demonstrates this situation when it says "all of the small and medium sized companies that want to take advantage of the benefits of this law should satisfy at least two of the following requirements: payment of social burdens; compliance with tax obligations; and/or compliance with labor responsibilities..." Thus it does not matter if these companies do not comply with labor norms, as long as they fulfill their fiscal obligations.

[5] http://www. inventariando.com/articulo.php?id=1919

5. THE AGRICULTURAL SECTOR

Different studies have determined that the North American Free Trade Agreement (NAFTA) accelerated the privatization of natural and strategic resources and therefore the displacement of millions of rural poor by large corporations.[6]

In the logic of the new FTA, the Latin American and Caribbean countries would be subjected to asymmetrical conditions characterized by the elimination of subsidies and taxes for products from the United States, while the US would be able to maintain and strengthen some of its own subsidies and taxes. The idea of open borders is only discussed with regard to countries in the South, while the US strengthens its own repressive migration regulations. The immediate economic consequences include the reduction of public investment in infrastructure or technical assistance for farm workers. Women will be most affected, because the economic changes affect their access to land titles, restrict their ability to get credit, and leave them alone with the family while the men are forced to migrate to find work.

The philosophy of CAFTA, like the FTAA, promotes large-scale, export-oriented agricultural production which ultimately decreases food security and benefits large multinational companies like Cargill, Continental, Louis Dreyfus, Bunge and Archer Daniel Midlands, which control 90% of the global grain trade.

Since the 1980s, both the International Monetary Fund (IMF) and World Bank (WB) have promoted the indiscriminate opening of agricultural markets in poor countries, through structural adjustment programs (SAPs). In Costa Rica, these agricultural policies brought "productive restructuring" in the late 1980s and early 1990s, which primarily aimed to substitute traditional products (especially grains for domestic consumption) with export products (flowers, exotic fruits, etc), hurting food security and subjecting consumption of basic products to the whims of the international market. In many cases, the quality of the imported product (rice, beans, and others) was inferior to that produced domestically. All of these changes, which led to deteriorating living conditions for farm workers, resulted from the SAPs.

The North American economy sustains itself through by imposing of high tariffs on agricultural products from other countries, while simultaneously forcing other countries to completely open their borders. This has made some countries lose production. One of the most frequently cited cases is the cultivation of soy in Brazil; this is one of the most efficient grain productions in the world, but the US has imposed tariffs that take away Brazil's ability to compete in that market. Haiti is another example; it was forced to reduce

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[6] See, for example: *Red Mexicana de Accion Frente al Libre Comercio (RMALC) www.rmalc.org; Common Frontiers www.web.net/comfront; official page of the FTAA www.ftaa-alca.org and webmaster@ALCA-FTAA.ORG; CIEPAC www.ciepac.org; Oxfam, magazine No. 37, Comercio con Justicia para las Americas, January 2003; Intenrational Forum on Globalization www.ifg.org; "ALCA, proyecto para la Anexion?" Osvaldo Martinez, Director del Centro de Investigaciones para la Economia Mundial; Taken from "The Economist", February 2002, www.cubaminrex.cu; Global Exchange www.globalexchange.org; Diario "Trabajadores"; Alianza Social Continental: Alberto Arroyo, Resultados del TLCAN en Mexico, Mexico, December 2001.*

the rice tariff from 35% to 3% in 1995, while subsidized rice from the US was simultaneously entering their market. Fifty thousand poor families who had depended on rice production were displaced. The US imports wheat at 46% less than the cost of production, and corn at 25% less. Nevertheless, the US puts restrictions on the importation of salmon and mushrooms from Chile, flowers from Colombia, Chile, Ecuador and Mexico, tomatoes and tuna from Mexico, and honey from Argentina. Meanwhile, cotton producers in Texas received $3.6 billion in subsidies in 2002, which is more than they received from selling the cotton. As a result, small producers in Peru saw their country inundated with US cotton, with imports increasing by 284% in 2002.

The Comisión Económica para América Latina y el Caribe (CEPAL) calculated that 7 million more people hit the poverty level in 2002 alone. The policies of free trade and the elimination of subsidies have accelerated the increase of poverty on the continent. The 2003 ILO study expressed concern that the FTAs and the labor relations they create have increased social deterioration in the countries where they have been implemented. In the concrete case of Costa Rica and the Central American countries, the fundamental dilemma is that most of the goods enter the US market without paying tariffs because that country unilaterally granted that benefit through the ICC. And in that sense, the pressure to approve the FTA is linked to the need to consolidate a legal status for those exports, which is not framed in a unilateral instrument subject to the whims of a given administration (for example, one newspaper article said that "Costa Rica runs the risk of being left without a market for 53% of its exports, which are currently sent to the United States" (La Nación Oct. 13, 2003).

The international organizations' impositions of SAPs, which Costa Rica has been approving since the 1980s, have transformed the country from a net agro exporter to an exporter focused on industrial products. In 2001, 31% Costa Rica's exports were agricultural products, and 69% were industrial products. More specifically, 15.6% of the total exports were machine parts and accessories, 10.1% were bananas, 5.2% equipment, 3.2% coffee, 3.1% medicine, and 2.9% pineapples.

Of the US$6.5463 billion imported in 2001 (see the table under Part 8 of this study), 92.7% were industrial products. These primarily included semiconductors (9.8%), petroleum or bituminous mineral oils (5.9%), other medicines (2.7%) and integrated circuits (1.8%) (Aug. 26, 2003 La Nación).

On the issue of agricultural production, CAFTA negotiators are discussing the application of an agreement based on a quota system and a gradual 15-year process of lowering tariffs. The Central American countries, conscious of the vulnerability of the agricultural sector and the dependence of their inhabitants on agricultural activities, put special emphasis on the elements that should be included in the "safeguard mechanisms" (which a country can apply when they feel that the other country's trade is hurting its producers; for example, by increasing tariffs on a particular product).

The fragility of the agricultural business in the region, which results from the globalized economy and the guidelines of the international financial institutions, has meant that the CAFTA negotiations are based on the offer of 6,000 *partidas arancelarias* to be proposed

on the panel. Each partida arancelaria defines the taxes that hurt one or several products when they enter another country. The objective of the agreement would be to "eliminate, on both sides, as many of these obstacles to free trade as possible" (May 5, 2003, La Nación). Nevertheless, this has not been possible in the case of the US economy, due to their protectionist policies.

There are profound differences between the Central American countries in terms of agricultural production and trade. For example, Honduras has a tariff of 45% on corn, while El Salvador and Costa Rica have tariffs of only 1%. This makes it difficult to present joint proposals (May 5, 2003 La Nación).

Given that most of the limiting factors on the agricultural issue have to do with economic aspects, the link between this and the labor question can be seen in the studies by the State of the Nation. Despite the growing population and needs of the Costa Rican rural sector, the number of new jobs that were created in that sector through 1999 was severely deficient if compared with the total number of workers (see table). Note that the peak of the SAPs (in the mid 1990s) coincided with the lowest number of rural jobs.

Years	1991	1993	1994	1995	1996	1997	1998	1999
Workforce	1,065,701	1,143,324	1,187,005	1,231,572	1,220,914	1,301,625	1,376,540	1,383,452
Agriculture	264,804	256,816	252,232	260,970	259,032	263,385	270,781	270,843

Source: State of the Nation 2001.

The Labor Inspectorate does not have a specific division to deal with the agricultural sector, as recommended by ILO Convention 129, further demonstrating the disinterest in that sector.

6. OBSTACLES TO COMPLIANCE

Within the Costa Rican system, one of the fundamental obstacles to the development of labor law is jurisdiction. In effect, different sectors accuse the judicial branch of preventing workers from reclaiming their labor rights, because of the long delays in the courts. The table at the end of this section lays out the time that labor processes take in the judicial system. This table does not include individual workers' complaints, which take an average of 18 months to be resolved, though many exceed that. According to the International Labor Office (1999), "The delays...are not necessarily the work of the administrative authorities, but could instead be due to the judicial system's lack of speed in application and execution..."

The principle of effective judicial protection is provided for by Constitutional Numeral 41, which provides that "... there shall be prompt, fulfilled justice, without denial and in strict conformity with the law." This principle is violated in several ways in Costa Rica.

In the case of the labor laws, this endemic evil is not foreign. The Office of Ombudsman for the People of the Republic (*Defensoría de los Habitantes de la Republica*, or DHR, established by Law No. 7319), complying with its duties to monitor public services, has

published several annual reports that have been critical of the Judicial Branch, and specifically, it has concentrated its criticisms on the labor jurisprudence.

This part of the study is based on the DHR Annual Reports from 2000-2001 and 2001-2002, but we also make reference to previous reports. In those reports, the Ombudsman analyzes the public service of the Judicial Branch as it relates to labor issues (though he does the same with other areas of the law), and with respect to this topic several problems are noteworthy, such as the deficiency and poor service with regards to labor issues given by the main "Mega Office" of the country.[7]

The Ombudsman's Office has expressed this complaint in its Annual Report for the period of 1998-1999, where it indicated that labor issues are "one of the issues about which it has received many complaints and consultations." (DHR Annual Report, 1998-1999, p. 101).

In the report from 2000-01, the Ombudsman's Office was concerned about:

> "...Not only the backlog in the judicial proceedings, but also a general lack of good public service from the judicial offices that work on labor issues in San José. The lack of coordination among these offices when updating information and adequately registering the files, especially for cases which have been transferred from one office to the next..." (DHR Annual Report, 1998-99, pp. 48, 101-02).

The DHR refers to a specific case there, but it demonstrates the very poor state of the internal control system that applies to the public service. The quote is in reference to a complaint filed by someone who testified that in 1997 there was a trial before the Labor Court of the Second Judicial Circuit of San José. After the trial, and after having been told that the decision would be handed down in three months, there was no result. This person visited the Court on several occasions, but was told that the record had been lost. This case was processed by the Tribunal of Judicial Inspection, which determined that if the record was lost, then there had been a considerable, but "normal" delay in its processing, considering the functional capacity of the Labor Court of the Second Circuit of San José. The Judicial Inspection also concluded that "it could not determine exactly who is the responsible party behind the delay in the record and as such, it was not possible to apply the disciplinary system."

Between 1999 and 2000, the DHR made a series of recommendations, soliciting from the Judicial Branch studies on the functioning of the Labor Court of the Second Circuit of San José, particularly about the measures that had been put into effect to facilitate more efficient service. It also asked whether any studies or evaluations existed about measures that should have been put into effect to improve the output of that office. According to the DHR, the Supreme Court of Justice remitted a copy of different accords adopted by the Full

[7] The system of "Mega Offices" consists of combining the judicial offices of several jurisdictions into a single "Center", and has had a clear impact on the capital of the Republic in the "Second Judicial Circuit of San José.

Court and the Superior Council of the Judicial Branch, in which it was observed that the mentioned agreements refer to individual matters, and have not resolved the heart of the problem of the "Mega Office" model.

The report cites references made by Magistrate Van der Laat (in Full Court, Session No. 31 of August 2000, Article XXVII), which recognize that "in the labor jurisdiction (...) there are 2,060 pending judgments, of which the oldest came to us on March 15, 1990, so we are more than ten years behind."

The DHR Report from 2000-01 informs that, because of the number of complaints presented to the Mega Offices, and in order to make a definitive decision while it analyzed the information about the service rendered, the Full Court decided on January 17, 2002 to not establish any more Mega Offices until it had carried out an in-depth evaluation to determine whether or not to implement another measure to address the needs currently faced by the judicial offices.

Though it does not relate specifically to public service, but rather to the public functionaries related to it, the labor instability of the judges themselves is another topic that relates to the Judicial Branch and labor issues. This subject was addressed by the Ombudsman's Office in its 2001-02 Report.

The DHR maintains that the independence of the judicial bodies with respect to the other powers and constitutional organs is not sufficient to guarantee the impartiality of judges. Internal independence is also necessary, which can be achieved by enhancing the labor stability of judges so that they can carry out their functions in the most transparent way possible, responding to the obligations to which public functionaries are bound.

The DHR report recounts a 1999 study on news stories about the labor instability of judges, to determine the possible effect of that situation on the Administration of Justice.

In response to requests for information, the Judicial Branch (office No. 15994-01, December 20, 2001) indicated that of the 264 job vacancies for judges of different levels for the year 2000, 26 positions for Supernumerary Judges still remained to be appointed at the end of 2001. It also said that all the aforementioned appointments have happened by lists of three candidates, in conformity with the System of Judicial Careers.

The observations of the Ombudsman's Office about the effect of the problems in the application of prompt justice from the Judicial Branch, as a negative factor for the effective protection of labor rights, has also been reflected internationally: "... the delays (...) are not necessarily the work of the administrative authorities, but may owe more to the lack of quickness in application and execution of the judicial system..." (International Labor Office, 1999).

Finally, the DHR emphasizes the need to remain vigilant and pay special attention so that these critical situations do not happen again, and to preserve the quality of service.

7. OBSTACLES IN THE ADMINISTRATIVE BRANCH

THE MINISTRY OF LABOR AND SOCIAL SECURITY

The Ministry of Labor and Social Security (MTSS) is the backbone entity of the labor sector in our country. It is the State organ in charge of the labor rights and social rights of Costa Rican workers and of foreigners in the country (Abdallah and Cokyeen, 5). The laws that stipulate the responsibilities of the MTSS for the protection of employment are the Labor Code, the Organic Law of the Ministry of Labor and Social Security (L.O.M.T.S.S.), the Equal Opportunity Law for the Disabled (No. 7600), the Law against Sexual Harassment in the Workplace and Schools (No. 7476), the Integrated Law for Older Adults (No. 7935), and the Regulation of the National Council of Labor Mediation (No. 29219).

The Organic Law of the MTSS grants it very clear responsibilities. The Ministry is in charge of guaranteeing the development, improvement, and effective application of the labor and social laws. These duties are carried out through the Ministry's various duties, such as prevention, protection, inspection, advising, and regulation. All of the aforementioned is fundamental to understanding that in any labor-related case in which impunity or the misapplication of the law is denounced, this Ministry will always be complicit (either by action or omission).

Some of the specific responsibilities of the MTSS for topics related to labor rights include:

- The Ministry protects the right to freedom of association, but not for all inhabitants of the Republic. While foreigners may join unions, they cannot hold positions of leadership (Article 61 of the Constitution).

- The Ministry protects the right to strike, but not for all inhabitants of the Republic. Public employees have only a limited right to strike in the "essential services," which the ILO defines as those that endanger the life, health, and safety of the public. It is worth pointing out that Vote No. 1317-09, in which several articles of the Labor Code were declared unconstitutional [Art. 375 and 376 (a), (b), and (e)], did not clearly define "public service".

- The Ministry does not protect the right to written hiring contracts. While labor law is guided by the concept of the "reality contract," the existence of a formal legal instrument is the ideal way to obtain legal security for workers. This is especially important if one takes into account the subterfuges that are used to deny labor rights to workers (Abdallah and Cokyeen, 9).

- The Ministry does not provide support to workers. The MTSS is required to grant transportation fares, tools, and other work implements to unemployed workers (Abdallah and Cokyeen, 13.). It is well known that it has never done this, nor is it believed that the political will exists to do it.

- The Ministry does not protect unemployed workers. The MTSS should maintain a registry of unemployment, based on mandatory information that employers must present to the Ministry when they fire workers. Of course this is another matter that the Ministry does not take up (Abdallah and Cokyeen, 13).

- The Ministry does not protect agricultural workers, as required by international law. ILO Convention 129, called the "Convention on Labor Inspection (Agriculture)", established in 1969 and approved by Costa Rica on March 16, 1972, requires ILO Member States to maintain a system of labor inspection in the agricultural sector. In Costa Rica this office was eliminated (Abdallah and Cokyeen, 33).

THE NATIONAL OFFICE ON LABOR INSPECTION

The Ministerial office in charge of promoting labor rights, controlling compliance, and administratively instructing infractions is the National Office of Labor Inspection (or DNI, for *Dirección Nacional de Inspección del Trabajo*) of the Ministry of Labor and Social Security. Problems detected in the DNI include the following:

Partiality: The inspector favors employers. Labor inspection in Costa Rica does not have a good image among workers, as they do not trust the inspector because they believe he always favors the employer.

Violations: The case of agriculture. For agriculture, the Regulation of Reorganization and Rationalization of the MTSS created a specialized office called the Department of Labor Inspection for the Fish and Wildlife Sector, as part of the National Office of Labor Inspection. However, this department disappeared with the new structure that came about in 2001. A specialized office no longer exists; rather, the fish and wildlife sector will come under the system of "focalization by sector". Costa Rica is therefore violating Convention 129, which relates to labor inspection in the agricultural sector.

Inspections do not contain preventitive functions. Costa Rican labor inspection is reactive, which means that it "puts out labor fires," or those labor conflicts that arise and are brought to their attention by workers' denunciations. But the preventive aspect, which has been a part of its duties since its creation, is not undertaken.

The "double visit" as a factor of impunity. The system of "double visit" inspection (inspection plus revision) protects the offending employer and facilitates impunity. The double visit should be an exceptional occurrence under Convention 81, but in Costa Rica, the Organic Law of the Ministry of Labor has turned it into the norm.

Failure to maintain a registry of repeated incidents. This means that each infraction will always be treated as if it were the first time that the employer has failed to comply with a labor law.

Based on the administrative procedure of the DNI, although inspection visits are planned for each inspector, many of them happen because of the petitions of workers, who report violations of their rights to the inspection office.

Although the number of denunciations presented by workers is unknown, it is known that there are many (Abdallah and Cokyeen, 28). However, this contradicts the DNI's image among workers: *"we haven't done studies, but according to the comments one hears, it seems that the working person has a deep mistrust of the inspector and tends to believe that the inspector makes an amalgam with the boss, that he tends to favor the boss in all inspections. The inspector is seen as corrupt, and as making very superficial visits, and that he doesn't do anything but inform the boss when a worker files a complaint."* (Interview, Franklin Benavides Flores). According to the interviewed functionary, that image is mistaken, although he does not doubt that there are some permissive inspectors out there who tend to be very tolerant.

What happens, in his opinion, is that the inspector, in order to gain entry into the company, must do so through the employer. The inspector interviews workers, reviews salary plans, and observes labor conditions. Then he returns to the boss to impose preventive measures if there has been an infraction, and after that, he disappears from the workers' sight. It appears to workers that he did nothing, although he complied with his obligation, and carried out the prevention that the law empowers him to. *"So what do the workers say? The inspector came, he met with the boss, and then they fired the workers who had filed the complaint and after that, nothing else happened"* (Interview, Franklin Benavides Flores.) Workers continue to go to Labor Inspection to denounce their employers as a last resort.

The leader of a new union created in a big transnational agricultural company provided one concrete case. He recalls that while the union group was an affiliate of a national union confederation, interaction with the Regional Office of the Labor Ministry and the company cost them the jobs of many affiliates. When went to present their affiliation papers to the Regional Office, the worker would almost immediately be notified of his termination. Since the company had not yet received the communication, it could claim that it did not know about the union affiliation, and was therefore able to avoid a clear violation of union privilege (*fuero sindical*). The situation continued until the workers decided to present their own union constitution, thereby ceasing to be affiliated with the confederation. Another union central had advised them to prepare a strategy that would allow them to do it without giving the company the opportunity to act. With that in mind, they presented their paperwork simultaneously to the Regional Office of the Ministry of Labor, the Department of Registration of Social Organizations in the capital city, and the company offices. With that strategy, they were able to avoid the circle of interrelation among those entities that had done them such harm in the past (Interview, J.G. Araya A).

One reason for the workers' mistrust and the minimal impact of the DNI is that its work is usually focused on individual cases. When its work addresses collective cases, it is only to become aware of denunciations about disloyal labor practices or union persecution and cases of temporary suspensions of work contracts. However, labor inspection does not promote the organization of workers, and therefore, it does not find counterparts who join them to avoid labor violations. Its work is limited to signaling that there are infractions of

the labor law by a certain employer, and to following a procedure that might culminate in a condemnation before a labor tribunal. Its work has no impact for the workers at an inspected company.

Unions say that the Labor Inspection is not fulfilling its responsibilities in Costa Rica. The unions perceive the Inspectorate's work to be far removed from their own agenda, and collaboration is therefore impossible.

Unions also mistrust the work of the inspection, for the same reasons that workers do. The Modernization Plan for the inspection creates national and regional consultative councils with the idea of creating a tripartite body (employers, State, and workers) to discuss policies of promoting labor rights that may have impacts on labor inspection. Nevertheless, these councils have not had the support of the unions at either the national or the regional levels, and there is little knowledge of their functions or of the scope of their actions (Abdallah and Cokyeen, 28-30).

The scarcity of human resources, budgets, and technicians inhibits the functioning of the Labor Inspection Office. In 2001, this office had only 89 labor inspectors distributed among 28 regional offices to inspect approximately 97,430 workplaces, or 1,095 workplaces per inspector. Each workplace inspection requires at least two field visits: the first to detect infractions and the second, if infractions are found (which is the case 95 percent of the time), to determine whether the employer has rectified them. For this reason the number of visits would double from 1,095 to 2,190 annual inspections per inspector (six per day). The Office is not in the condition to carry out its functions in an optimal way.

Additionally, due to the internal reorganization that occurred in 2001, the office in charge of controlling labor conditions in the agricultural sector was eliminated, in violation of Convention 129 of the ILO, which is weakly incorporated into the Costa Rican legal system.

There is no doubt that whatever the obstacles to the optimal respect for labor rights in Costa Rica, the situation of the National Office of Labor Inspection of the MTSS is a fundamental factor in the challenges to enforcing the laws.

THE 2004 "PROCEDURAL MANUAL FOR THE LABOR INSPECTORATE":

The "Procedural Manual for the Labor Inspectorate" appeared published in the Official Gazette No 8 on January 13, 2004. This Manual adecua the practices, procedures and policies of the Labor Inspectorate and MTSS.

The Manual emerged from a Directriz of the Executive power,a nd it was authorized by the MTSS and the Inspector General of Labor, en acatamiento a a Law Protecting Citizens from Excessive Administrative Requirements (Law 8220). This Manual was intended to reform the procedural manual issued thorugh Directriz 1677. The new manual does not introduce any modifications on:

- Special promotion of unions;

- Promoting the right to strike
- Special protections for women's rights
- Creation of a Labor Inspectorate for the agricultural sector;
- Special fast and expedited mechanisms for registering unions.

In any case, the new Manual does not appear to be accompanied by an increased budget. It only presents a list of responsibilities and procedures. Given the Inspectorate's limited resources, this will only further complicate the work of its officials.

OBSTACLES OBSERVED:

1. The Ministry of Labor and DNI lack the economic resources to fully protect labor rights.

2. The Ministry of Labor lacks the power to influence public social policies.

3. The leaders in the Ministry of Labor have contradictory ideological positions regarding unionization and strikes.

4. The unions lack information and understanding on the different instruments available for defending labor rights.

MAIN FAILURES DETECTED:

1. Refusal to consider the importance of the Labor Inspectorate in the agricultural sector by separating it from the centralized offices.

2. The Ministry of Labor violates some of the norms created to support workers.

3. Labor inspectors are unable to effectively cover all workplaces.

A. FREEDOM OF ASSOCIATION

CENTRAL THEME	National Labor Laws	International Standards / ILO Conventions	Principle Changes Last 5 Years	Parallel Legislation	Obstacles to Enforcement	Example of Non-Compliance
Freedom to Unionize *The Freedom of Association is based on three essential principles: (A) the free association with and disassociation from the union; (B) the plurality of union groups; and (C) the necessary autonomy of union associations to act freely before the State, other associations, and the employer, so that the collective groups can develop and carry out their objectives without external negative interference with their specific goals. Its basis is in the freedom of association, which is a constitutional right and is expressed in the Universal Declaration on Human Rights.*	Political Const. Arts. 25-60. Conv 87 ILO, Art 2. Conv 135 ILO: Union Privilege (*Fuero Sindical*). Labor Code, Titulo V. Arts 332 to 370. Social Orgs. (Unions) Art 339 and ss.	C11 Convention on the Right of Association (Agriculture), 1921 C87 Convention on the Freedom of Association and Protection of the Right to Organize, 1948 C98 Convention on the Right to Organize and Collective Bargaining, 1949 C135 Convention on Workers' Representatives, 1971 C141 Convention on Rural Workers' Organizations, 1975		Law No. 7369 to avoid interference of solidarism in union activity.		UN Human Rights Committee, Session 5, April 1999, Session 1751. It concerns the Committee that Costa Rica does not respect the freedom of association of workers in small agricultural businesses. The APSE complains before the ILO about the government's denial of permits to carry out the Assembly. Case 2069 (2000).

A.1. RELEVANT NATIONAL LABOR LAWS:

A.1.1. Constitutional Laws

It has been said that the freedom of association arises in Article 25 of the Constitution (Hernández Valle, 388). However, it is Article 60 that gives it power, specially designating it as a collective right. To refer to the freedom of association as merely a right of all inhabitants of the Republic to associate for profit is only a partial interpretation, lacking full meaning, because the right of labor association is a collective right.

This fundamental right has been the subject of many complaints by the workers' movement, because of workers' fear of reprisals for organizing or joining a union (International Labor Office, 2002: 390). The State entities are not politically disposed to promote unionization, despite Article 361 of the Labor Code, which provides that "the Ministry of Labor and Social Security shall be in charge of encouraging the development of

the labor movement in a harmonic and ordered fashion, by all legal means it deems appropriate."

The main obstacles to the right of free association are the profound "anti-union ideology", which perceives unionization as a negative factor for labor relations, and the State's failure to promote it as a truly fundamental right.

A. 1.2. Convention-Based Laws

The Conventions of the International Labor Organization related to freedom of association are:

> Convention 11 on the Right of Association (Agriculture), established in 1921.
>
> Convention 87, on the Freedom of Association and Protection of the Right to Organize, was established in 1948 and approved by Law No. 2561 on May 11, 1960.
>
> Convention 98 from 1949, on the Right to Organize and Collective Bargaining, was incorporated in the Costa Rican legal system by Law No. 2561 on May 11, 1960.
>
> Convention 135, on Workers' Representatives, was established in 1971 and approved by Law No. 5968 on November 9, 1976.
>
> Convention 141 on Rural Workers' Organizations dates from 1975.

The debate surrounding ILO Convention No. 98 has brought criticism to the way that right has developed in Costa Rica. This international instrument has been the foundation of one of the most important complaints that the labor movement has brought to the attention of the ILO: Case No. 1483 presented to the ILO Committee on Freedom of Association.

The government has historically responded to denunciations of non-compliance with International Conventions by issuing "proposals" or by taking inter-institutional measures to make it appear to the international body that the subjects of the complaints do not exist or that they will soon be corrected. What happened with Case No. 1483, presented in the early 1990s to the ILO Committee on Freedom of Association, and which provoked a reform in the labor code (Law No. 7360 of November 4, 1993), is an example of this. The evidence of lack of enforcement – which is presented in this chapter – confirms the true intention of the State when it issues such proposals.

A.1.3 National Statutes

The Labor Code, especially after the reforms of Law No. 7360 of November 4, 1993, refers to a long list of rights concerning unionization.

The following table depicts the most overarching elements of the labor laws relating to this right, such as the number of the law that refers to it, the obstacles believed to exist for the full exercise of the right, and the legal reform that inspired it.

LAWS OF THE LABOR CODE RELATED TO THE RIGHT OF ASSOCIATION WITH A UNION			
Art.	Topic	Foreseeable Obstacles to Enforcement	Achievements of the Law
332	The constitution of unions is declared to be of the public interest. Unions are defined as one of the most efficient means of contributing to the maintenance and development of the Costa Rican popular culture and democracy.	The authorities do not encourage this image of unions.	*It attempts to give the union an active function as a central element of negotiation, to achieve coherent labor relations through collective bargaining.*
333	Absolutely prohibits all social organizations from carrying out any activity that is not based on the strengthening of its socio-economic interests.	The system does not facilitate greater influence in the financial institution of the country: the People's Bank.	Economic recoveries are seen as a fundamental aspect of union activity.
337	The Ministry of Labor and Social Security, through its Office on Unions, shall be responsible for the strict monitoring of social organizations, with the exclusive purpose of ensuring that they operate in accordance with the law.	The National Office for Labor Inspection does not encourage the organization of unions and does not develop strong mechanisms to prevent the repression of labor unions.	*The name of the institution was changed by Art. 1 of Law No. 3372 of August 6, 1964.*
338	The only penalties that shall be imposed on social organizations are fines and dissolution, in cases expressly indicated by Article 359 of the Labor Code. The directors of the social organizations shall be responsible for all infractions or abuses they commit in the performance of their duties.		
339	Definition of a Union: Any permanent association of workers, employers, or persons of a profession or independent occupation, organized exclusively for the study, improvement, and protection of their respective common economic and social interests.		
343	Recognizes the right of employers and workers to form unions without prior authorization (but they should initiate the process of constitution within 30 days of same). It is not possible to constitute unions with fewer than 12 members if it is a workers' union, nor with fewer than 5 employers if it is am employers' association.	It is not possible to constitute unions in micro-businesses because of the low number of workers in these businesses.	*The goal is that small businesses can organize unions.*
344.	Establishes the procedure to legally constitute a union.	It does not establish for the Ministry a role as a promoter (of unions).	
350	The Labor Tribunals shall order the dissolution of a union for reasons such as:		

	- Intervention in political matters – elections; - Activities contrary to the democratic system; - Activities not based on the strengthening of its socio-economic interests (Art. 333 of the Labor Code); - Engaging in for-profit activities; - Using manifest violence against workers; - Encouraging criminal acts; - Giving false information to the authorities.		
355	Procedure for the liquidation of the union.		
360	The Board of Directors of any union, federation, or confederation of workers' unions, has legal personality to represent in and out of court each one of its affiliated members in the defense of their individual interests of socio-economic nature, if they expressly solicit such representation.	The requirement that the workers expressly solicit representation from the union is a serious limitation.	
361	The MTSS is responsible for promoting the development of the union movement in a harmonic and ordered fashion, by any legal means it deems appropriate. Therefore, it will issue, in executive decrees, all necessary decisions to guarantee the effectiveness of the right to unionization.	The Ministry does not promote the development of the union movement. To date, there are no executive decrees regulating anything related to said promotion or which confront union persecution.	*This law creates the possibility of promoting unionization, which as the previous box indicates, has not happened.*
362	Imposition of fines for unions for non-compliance with their obligations.		
363	Prohibits actions or omissions tending to inhibit or impede the free exercise of the collective rights of workers, their unions or coalitions of workers. Any act that limits these entities is absolutely null and void and will be sanctioned, in the form and manner indicated by the Labor Code, its suppletory or related laws for the infraction of prohibitive decisions.	This law is not reflected in the daily actions of the Ministry of Labor. Evidence of this is the lack of unions in the businesses of certain private sectors (such as the textile and commercial sectors) (Interview, Luis Serrano).	*It is recognized that the National Office of Labor Inspection has the authority to promote unionization, but a lack of resources impedes this.*
364	Possibility of a union to resort to an administrative office to present denunciations. (Ministry of Labor).		
366	Possibility that the administrative office (Ministry of Labor), once it confirms that offense, may submit the denunciation to the Courts of Justice.	The deficiency of the courts of labor justice has been demonstrated (DEFENSORÍA. 2000-2001/2001-2002), often leaving this administrative procedure meaningless.	
367	List of persons who shall enjoy labor stability, to guarantee the defense of the collective interest and autonomy in the exercise of union activities: a) Those workers who are members of a union in formation, up to 20 workers (protection for two months) b) A leader for the first 20 workers	There is evidence of constant practices of the employer sector that attempt to ignore this union privilege. (Interview, Luis Serrano, Gilberth Bermúdez, J.G. Araya).	*This law is implemented with Case 5000-93, delimiting the terms of the union privilege (fuero sindical).*

	organized in the respective company and one for every 25 additional organized workers, up to a maximum of four. (Protection while they fulfill their duties and six months after their term). c) The affiliates that present their candidacy to become members of the Board of Directors (protection for three months). ch) Where no union exists, the representatives freely elected by the workers will enjoy the same protection in the proportion and duration established in section (b) of this article.		
368	In the event of an unjustified termination of a worker covered by the aforementioned protections, it shall be declared null and void by the labor judge, and s/he will order the reinstatement of the worker and back pay, as well as the appropriate sanctions for the employer. Where the worker does not accept reinstatement, the company shall indemnify the worker.	Constitutional case law has made termination possible in cases or reorganization of services (Vote No. 571-96). The Costa Rican system is governed by the "freedom to fire".	*This deals with the incorporation of a regimen of "relative labor stability" for certain workers.*
369	Just causes for the termination of workers covered by the aforementioned protections.	As mentioned in the commentary on the previous article, the courts have made possible other cases.	
370	When there is a union to which at least half of the workers plus one are affiliated in a certain company, the employer is prohibited from engaging in collective bargaining with anyone if it not with the union.		

The other law related to unions is Law No. 1869 (Organic Law of the Ministry of Labor and Social Security, or LOMTSS), which organizes the General Office for Labor Relations as a department within the Ministry of Labor and Social Security. The Fifth Title regulates Labor Inspection. That title grants as a primary function the monitoring of compliance with the laws, conventions, collectives, and regulations, and also addresses collaboration with the Costa Rican Social Security Fund and other State institutions.

This law is important because it is the regulatory framework of the state entity most directly linked to union promotion. The Costa Rican state, applying Conventions 81 and 129 of the ILO, has defined that Labor Inspection is under the monitoring and control of a central authority, in this case, the Ministry of Labor and Social Security, with the objective of protecting labor rights in an effective manner (Abdallah and Cokyeen, 8-9).

A recent study notes that 186 denunciations for union persecution were presented to the National Office on Labor Inspection in the span of seven years, from 1993 to 2000 (Abdallah and Cokyeen, 38). Of those, the majority (46.2%) were archived, which is to say

that they did not arrive to the judicial chambers. If we add the denunciations where the petition was denied, 62.9% of the denunciations for union persecution were not resolved by a judicial chamber. Another frustration is that the remaining 34.9% of the denunciations that were accepted by the administrative office were not tried before a judge. Where the administrative branch approves a case, it declares that it has sufficient merit to be reviewed by the judicial branch, but only in the judicial branch can the facts be tried. In other words, the fact that the administrative office accepts a denunciation for union persecution does not guarantee that the offending employer will be sanctioned, because the denunciation must first be tried in the judicial branch.

This agency of the MTSS, as you can see, is not guaranteed to put the brakes on union repression. Its own statistics demonstrate that, from the perspective of protecting the right to unionize, its operation is not optimal. The factors that explain this are lack of resources; the many responsibilities assigned to the inspectors (of which the investigation of denunciations of union repression is only one); and the lack of interest or political will to strengthen the MTSS.

A.1.4. Other statutes of lesser importance

No other statutes were found. Regulation of the procedural articles provided in this part of the Labor Code is needed, because some laws are the objects of administrative interpretations that may curtail the right to freedom of association. These interpretations attempt to establish burdensome procedures to register a union, or to limit the defense of the union privilege (*fuero sindical*) (Interview, Gilberth Bermúdez).

A.2. PRINCIPLE CHANGES IN THE LAW RELATED TO THE FREEDOM OF ASSOCIATION IN THE LAST 10 YEARS:

A.2.1. Relevant statutes

In the lapse of time referred to in this section, some reforms have been made to the Labor Code, some more significant for union rights than others. Perhaps the most important is the one that reformed several articles related to the freedom of association (Law No. 7360 of 1993).

Another law issued in this time span is the modification to the Law of Labor Risks (through Law No. 6727 of March 9, 1982).[8]

But Law No. 7360 of 1993 is the one that most decidedly modifies Chapter III of the aforementioned Code (in the part on "Protection of Union Rights"). This legal provision established that the enumeration of the articles would run as follows: Article 364 became Article 371, and everything that follows until 579, which became the current Article 586.

[8] With respect to this law, it is important to clarify that, especially if one consults the text related to this law that dates back to the beginning of the 1980s, the articles of the Labor Code that until then had been identified with the numbers 262-292, now have the numbers 332-362, in Chapters I and II of Title V of the Code.

A.2.2. The Origin of these Laws

There is no mention of Law No. 6727 of March 9, 1982, because as stated above, that one arose out of the change in the Law of Labor Risks.

It is important to specify some of the characteristics of Law No. 7360 of 1993. An important part of its genesis can be found in Case No. 1483 that was presented to the ILO Committee on Freedom of Association. Because of its recommendations (at the end of 1991) declaring the inappropriateness of the replacement of workers' organizations by Solidarity Associations, and because of the need for Costa Rica to strengthen its union laws, several things happened that claimed to eradicate *solidarismo* (Blanco, 2).

In this context, the Law of 1993 was passed, which added several articles to the Labor Code in relation to union guarantees and freedoms. In that same moment the Constitutional Court handed down judgment 5000-93, which protected the right to relative labor stability not just for union leaders, but for all unionized workers.

A.2.3. The consequences of enforcing these laws for the Freedom of Association

The case law of the Constitutional Court (charged with the control of constitutionality in Costa Rica) has established the scope and limitations of the right to freedom of association.

THE SCOPE OF THE RIGHT TO FREEDOM OF ASSOCIATION

Among the advancements, one can cite the position given to the right to freedom of association over the actions of state control: the Ministry of Labor cannot exercise administrative police powers over unions (Constitutional Court, Case 71-89).

Also, the right of associationwas defined as having the objective obtaining and preserving economic, social, and professional benefits (Decision of the Constitutional Court, No. 233-95).

Similarly, the union privilege has been defined very broadly, in Opinion No. 2810-96.

And fundamentally, it came to establish the relative labor stability of union leaders and unionized workers, establishing that the protection of labor union leaders comes from the act of organizing the union. See the relevant Opinion No. 5000-93, and *inter alia*, No. 3869-94.

THE LIMITS TO THE RIGHT OF FREEDOM OF ASSOCIATION

Regarding the procedures to protect the right to freedom of association, the Labor Code, upon establishing an administrative procedure before the Department of Labor Inspection, established a more appropriate path than the summary process that occurred with the recourse of *amparo* (or, special remedy for a constitutional violation). This is because proof offered by both parties may be examined in the jurisdiction of the Labor Inspection,

whereas the constitutional jurisdiction is very limited in this sense (Opinion No. 5649-96). It is said that the limitation exists because of the deficiencies and shortcomings that characterize the administrative agency.

Another decision of the Constitutional Court established that the refusal to give information to a union does not violate the right established in Article 60 of the Political Constitution, because the omission does not harm the freedom of association (Constitutional Court, No. 3007-96). This holding renders union law meaningless because it denies the power of representation and vitiates the functions of the union.

The Constitutional Court has even facilitated the dismissal of union leaders by what is called "causes for just termination" in cases of forced reduction of services "for lack of funds or to achieve an improved organization of services" (Opinion No. 571-96). This decision, permitting "reorganization" to justify termination, affects the union privilege and reflects a view that conceives of the labor movement as an obstacle more than as an "active actor, a central element of negotiation (...) that promotes (...) coherent labor relations through collective bargaining" (Sepulveda, 170-171).

Constitutional Court case No. 5000-93 established relative labor stability for union leaders and unionized workers. While the changes promulgated in Law No. 7360 of 1993 strengthened union organizations as opposed to solidarity associations, it did not achieve the widespread promotion of unions for two reasons. First, the text of the reforms required accommodating regulations in some cases to further clarify the rights, which to date have not been defined. Second, the modifications to the Code were not sufficiently forceful to eradicate the influence of anti-unionists from the processes of negotiation and workers' representation. This is manifested by the intervention of the Permanent Workers' Committees in negotiations, which displace unions or take their place where unions do not exist due to a lack of promotion, or because of the presence of solidarity associations in collective bargaining processes, which participate as "friendly third parties" (Blanco and Trejos, 35).

In general terms, the denunciations of union persecution have come to situations such as "factual procedures" (*vias de hecho*) against union leaders (International Labor Office, 1999).[9]

As you can see in the next table, starting in 1997 there was a marked decrease in the number of unions, while simultaneously there was an increase in the number of solicarity associations. At the time there was a general sense of discrediting unions, and there were prohibitions on collective bargaining in the public sector, which led many public sector workers to resign from unions. In addition there continued to be adverse conditions in the administrative apparatus, characterized by insufficient funding for MTSS and DNI.

Number of active civil society organizations	1996	1997	1998	1999	2000	2001	2002	2003
Unions	319	283	279	212	205	253	219	260

[9] [Trans. note: Not sure what "vias de hecho" means.]

Solidarity associations	1481	1389	1398	1043	1058	1067	1074	1157

Source: Proyecto Estado de la Nación 2003. IX. Informe del Estado de la Nación. 2003

The fact that there were fewer unions in 2003 than in the mid 1990s shows the system's promotion of *sindicalismo*. The resulting proliferation of solidarity organizations is tied to the historical anti-union fight.

The following table lists the number of unions and solidarity associations (both active and inactive) by sector.

Number of unions by sector	Central government	Autonomous institutions	Semi-autonomous institutions	Undefined	Private
	73	114	14	41	564

Number of solidarity associations by sector	Central government	Autonomous institutions	Semi-autonomous institutions	Undefined	Private
	17	32	11	221	2034

SOURCE: ASEPROLA, using information from an MTSS study. Fuster, Diana. 2003/2004.

By comparing these figures we can identify some factors in the development of these two types of organizations within the Costa Rican system. First, it is clear that it is necessary to look at increases or decreases in the number of each organization within the context of a certain period or moment. It appears that there is a higher level of unionization and union consciousness in the autonomous institutions, followed by the central government. In general terms, the semi-autonomous institutions have the least need for (or consciousness of) organizing, both in terms of unions and solidarity associations. The figures related to the private sector cannot be compared, because we must remember that there are many more workers in the private sector than in the public sector.

A.2.4. Perspectives on the future of these laws

While the idea behind incorporating a new scheme of legal relationships, as provided by the Free Trade Agreement with the United States, is to respect the standards in each national system, the problem in Costa Rican labor law is that there are fundamental problems of enforcement and institutional deficiencies that make compliance with the law impossible. In this sense, the announcement of new legislative proposals to "improve" current conditions, is no guarantee and is even less so in the context of the free trade agreement that will possibly dilute any effort to enforce the laws effectively.

Legislative Record No. 13, 475 established several reforms to the Labor Code that were undertaken "... with the goal that (...) this legal body is in accordance with the Conventions of the ILO that our country has ratified ..." This refers to the latest recommendations of the ILO Committee of Experts regarding Costa Rica's enforcement of Convention 98. The Committee commented that the lack of implementation of the 1993 Labor Code reforms nullifies many possibilities to strengthen the right to unionize and does not demonstrate political will in the Legislative Assembly to approve a balanced text to facilitate this. (International Labor Office, 2002: 390; Interviews with Gilberth Bermúdez, Luis Serrano).

The confusing and slow proceedings of the administration, such as the non-regulation of Numeral 361 of the Labor Code, similarly contradict the guarantee of stability of unionized workers referred to by Constitutional Court judgment No. 5000-93. The obstacle to enforcement of labor rights is located not only in an administrative system that has no vocation to promote and defend unions, but also in the legislators' lack of political will to issue clearer and more effective regulations with a sanctioning component that would promote real enforcement.

A.3. PARALLEL NON-LABOR LEGISLATION:

A.3.1. General reference to these laws

This section will deal with three very specific situations: (1) the solidarity associations; (2) the argument that the administrative laws undermine labor rights; and (3) the idea that unions should have greater influence in the financial entity of workers, the Bank of the People and of Communal Development.

While for some the Law of Solidarity Associations (Law No. 6970 of November 7, 1984) is a labor law, now more than ever – after the 1993 modifications of the Labor Code and the Law of Worker Protection of 2000 – the legal regulations that refer to solidarity associations imply that they are laws of an economic type, and can no longer be regarded as strictly labor laws. For this reason we refer to *solidarismo* in this section. *Solidarismo* interfered with labor negotiations for many years (until the reforms promoted by Law No. 7360 of 1993), thereby limiting the development of unionization. After 1993, such actions changed legally; however, in reality, they have continued in the form of other practices.

According to Article 10.1 of the Law Regulating Contentious Administrative Jurisdiction, the union, as an entity with corporate representation, has procedural authority to represent and defend the corporate interests of the workers when involved in a judicial proceeding, the object of which is to contest the laws of general application that directly affect them. This is a mechanism that is not enforced due to a lack of funding and a lack of knowledge about the administrative laws.

When the Organic Law of the Bank of the People and of Communal Development was passed on July 11, 1969, the Assembly of Workers of the Peoples' Bank (ATBP) was comprised of 20 representatives for each confederation (for a total of 120, from the CUT, CTCR, CATD, CNT, CCTD, and CTC, which later became the CMTC) and 20 representatives of non-confederated unions (for a total of 140). Representatives from other sectors were distributed as follows: traditional cooperatives, 20; self-managed cooperatives, 10; solidarism, 20; communal associations, 40; school teachers, 40 (ANDE, 30 and APSE, 10); artisans, 10; and independent workers, 10.

With the interpretation of the Constitutional Court regarding the determination of the owners of the social capital of the Peoples' Bank, representation became a function of the contributions paid in by each sector. It is maintained that here the Court again ruled against unionization because it based participation on the low contributions of the unionized workers, which diminished the representation of the union movement.

The integration of the ATBP by sector for the years 2002-06, after the ruling of the Constitutional Court is as follows: Confederated union movement (owners), 23; non-confederated unions, 11; the solidarity movement, 58; professional sectors, 35; the quantity of the teachers is greater, while the sector of Communal Associations is the same as it was originally.

This demonstrates the shrinking likelihood that the union sector could be a main player in defining public financial policies related to the working class. The ATBP is the only part of the Assembly with constitutional character (according to Article 60 of the Political Constitution).

A.3.2. Relevance of this law to the Freedom of Association

The power and success of the Solidarity Associations rested on the fact that their economic contribution scheme represented an important attraction and a real advantage over unionization in economic terms. What was hidden was the true management-directed leadership of the associations.

After 1993, solidarism began to use other strategies to maintain itself in the field of labor negotiations, by promoting "organizations of the employer's influence," union organizations of security or of the company, that arise from the direct or indirect initiative of the employer (Blanco and Trejos, 28-29). They also participate in processes of collective bargaining as "friendly third parties." (See citation under section A.2.3.).

In response to actions undertaken by national and international union movements, the ILO has made statements against solidarism, which have required Costa Rica to promote laws limiting it. But this came out of a respect to union autonomy and as the result of an awareness-raising campaign that has demonstrated that solidarism is not a movement of the workers themselves. In Costa Rica, the defenders of solidarism have promoted bills in the legislature (Bill to Strengthen Solidarism, Record No. 14, 712), with the objective of giving them greater economic power. One important aspect of this is the fact that the Law of Solidarism (No. 6970 of 1984), when it was reformed by the changes to the Labor Code in 1993, implied that solidarity associations were prohibited from carrying out collective conventions or direct agreements of a labor character, but surprisingly, it also applies the prohibition to unions with respect to their eventual activities against solidarism (BLANCO, 1993:9).

The Law Regulating the Contentious Administrative Jurisdiction, or LRJCA, grants procedural legitimation to the union beyond that which is stipulated in Article 360 of the Labor Code, which provides that the Board of Directors of every union has legal personality to represent in and out of court each one of its affiliates in the defense of their individual interests of socio-economic character, but only if they expressly solicit it. Article 10.1 of the LRJCA facilitates a broader representation for the defense of corporate interests, as long as the trial has as its objective a challenge to laws of general applicability in the central or decentralized administration that directly affects them.

The law specifies:

> "The following people can demand the declaration of illegality and, in their case, the nullification of the acts and laws of the Public Administration:
> a) Those who had a legitimate and direct interest in it; and
> b) The Entities, Corporations, and Institutions of Public Law and any entity demonstrating the representation and defense of interests of a general or corporate character, when the trial has as its objective a challenge to laws of general applicability in the central or decentralized administration that directly affects them, except as provided in the following section." Article 10.1, LRJCA.

The principle obstacle to enforcement of the LRJCA is partly due to the rare enforcement of public law in the labor context, notwithstanding the fact that many laws that could affect labor rights arise out of administrative laws. It is also due to the slow pace of the contentious administrative jurisdiction, which does not give incentive to this type of process in light of the fact that (with all its faults) the labor process is simpler.

A.3.3. Perspectives on the Enforcement of these Laws and How They Affect Compliance with the Freedom of Association.

The strategic goal of solidarismo has historically been to impede the collective defense of workers' interests. For example, the promotion of direct agreements on banana plantations impeded the mechanisms of pressure in each workplace, and inhibited the integration of other plantations and other regions in carrying forward workers' demands. It represented a true manipulation of the union labor movement. The struggle for the recovery of the rights of workers and their autonomous organizations was able to achieve, through pressure of the ILO and of the global union movement, the cessation of acts of solidarist interference. However, the legislative initiatives to strengthen this movement are part of the strategy of employers with the objective of subordinating unionism.

The different means used by the "organizations of the employers' influence" to intervene in labor negotiations – participating in collective bargaining processes as "friendly third parties" and organizing "Permanent Workers' Committees" – are ways that they maintain their manipulation and control of the Costa Rican legal system.

A.4. OBSTACLES TO THE ENFORCEMENT OF THE LABOR LAWS RELATED THE FREEDOM OF ASSOCIATION:

A.4.1. List of obstacles

From the analysis undertaken, it is possible to determine that the real obstacles to the freedom of association in Costa Rica are the following:

1. AN ANTI-UNION IDEOLOGY. The penetration of an "anti-union ideology" in the state entities responsible for labor relations and in many of their functionaries has grown to such a degree as to perceive unionism as a negative factor in labor relations, and there is a failure on the part of the State to promote it as a truly fundamental right.

2. IMPOSSIBILITY OF THE UNIONS TO PERMEATE THE PUBLIC FINANCIAL POLICIES OF A SOCIAL ECONOMY. The system does not grant unions a better ability to intervene in the People's Bank. It thereby prevents the only autonomous workers' organizations protected by the constitutional system from being protagonists in the process of defining public financial policies.

3. LACK OF IMPLEMENTATION OF THE LAWS PROMOTING UNIONISM. There is no procedure that establishes the role of the Ministry of Labor in promoting unionization. To date, there have been no executive decrees regulating anything having to do with union promotion, or which address union persecution. The National Office of Labor Inspection does not encourage union organizing, nor does it develop meaningful mechanisms to avoid union repression.

4. THE IMPOSSIBILITY OF ORGANIZING UNIONS IN SOME PRODUCTIVE ACTIVITIES. It is not possible to organize unions in micro-businesses because of the low number of workers in these businesses. The obstacles to promoting unionism are reflected in the fact that not a single union exists in companies of the textile or commercial sector. In fact, one only sees the enormous challenges that independent unions confront when they try to organize employees of micro-businesses.

5. UNION REPRESENTATION OF THEIR AFFILIATES. The requirement that the workers must expressly grant authority to the unions is a serious limitation, because curiously, the contentious administrative jurisdiction grants a broader authorization. The principle obstacle to the enforcement of the Law Regulating the Contentious Administrative Jurisdiction is partly due to the rare enforcement of public law in the labor context, notwithstanding the fact that many laws that could affect labor rights arise out of administrative laws. It is also due to the slow pace of the contentious administrative jurisdiction, which does not give incentive to this type of process in light of the fact that (with all its faults) the labor process is simpler.

6. THE DEFICIENCY OF THE JUDICIAL SYSTEM COMPLEMENTS THE DEFICIENCY OF THE ADMINISTRATIVE SYSTEM FOR THE PROTECTION OF UNION RIGHTS. According to the Ombudsman for the People of the Republic, the deficiency of the tribunals of labor justice is evident, which often renders administrative procedures meaningless. It has thus been argued that the Judicial Branch has a responsibility to correct the deficiencies in enforcement of this law (ILO Individual Observation regarding Convention 98. Session 87: 1999).

7. ANTI-UNION SENTIMENT IN CONSTITUTIONAL CASE LAW. Contrary to a perception of the union as an engine of labor progress (that benefits workers as well as the production, which benefits the employer), constitutional case law has facilitated the termination of workers in cases of the reorganization of services (Case No.

571-96). Similarly, another holding from the highest court of constitutional control has established that the refusal to give information to a union does not violate the right established in Article 60 of the Political Constitution, because the omission does not harm the freedom of union association. (Constitutional Court, No. 3007-96). This decision renders labor law meaningless in that it denies the power of representation and vitiates the function unions.

8. THE FREEDOM TO FIRE AS CONTRARY TO THE UNION PRIVILEGE. Costa Rica is governed by the "freedom to fire," and this represents a big danger for the union privilege. The decision of the Constitutional Court to facilitate the dismissal of union leaders with the so-called "causes of just termination" in cases of forced reduction of services is one more obstacle.

9. LACK OF KNOWLEDGE OF THE CONSTITUTIONAL JURISDICTION ABOUT THE SHORTCOMINGS AND DEFICIENCIES OF THE ADMINISTRATIVE AGENCIES. Since the Constitutional Court believes that the administrative procedure of protection of the defense of labor rights is inappropriate and lacking resources to protect the right to free unionization, the procedure established by the Labor Code is a more appropriate path than the summary process that occurred with the recourse of *amparo*, which is the product of a very limited perspective due to the deficiencies and shortcomings that characterize the administrative agency.

10. THE SITUATIONS THAT IMPEDED THE EXTENTION OF UNION RIGHTS AFTER CASE 5000-93. Case No. 5000-93 of the Constitutional Court established relative labor stability for union leaders and unionized workers. While the changes promulgated in Law No. 7360 of 1993 gave force to union organization as opposed to solidarity associations, for two reasons it did not achieve the widespread promotion of unions. First, the text of the reforms required accommodating regulations in some cases to further clarify the rights, which to date has still not been defined. And second, the modifications to the Code were not sufficiently forceful to eradicate the influence of anti-unionists from the processes of negotiation and workers' representation. This is manifest by the intervention of the Permanent Workers' Committees in negotiations, which displace unions or take their place where unions do not exist due to a lack of promotion, or because of the presence of solidarity associations in collective bargaining processes, which participate as "friendly third parties."

11. THE LACK OF POLITICAL WILL TO PROMOTE UNION RIGHTS. The obstacle to enforcement of these rights is located not only in an administrative system that has no vocation to promote and defend unions, but in the consequent lack of political will of legislators to issue clearer and more effective regulations (perhaps with a sanctioning component that would promote real enforcement).

12. CASES OF DENUNCIATIONS AGAINST THE FREEDOM OF ASSOCIATION. The union movement, in spite of the successes of the campaign to demonstrate the manipulative processes of solidarism, has not received a satisfactory response to its claims, such as in the cases of the following denunciations:

- Individual case related to ILO Convention 98 on the right to organize and collective bargaining, 1949. Publication 1999. Case regarding the termination of union leaders in FERTICA S.A.
- Individual observation related to ILO Convention 98 on the right to organize and collective bargaining, 1949. Publication 2000. Commission takes note of the bill of public employment existing since 1998. It asks the government to keep it informed.
- Individual observation related to ILO Convention 98 on the right to organize and collective bargaining, 1949. Publication 2001. Denunciation *rerum novarum* that judicial decisions deny the right to collective bargaining in the public sector. Asks the government to respond to comments presented by the union.

In 2001 a representative of the workers sector reported to the ILO that certain recommendations of the Committee on Freedom of Association had not been complied with, namely, numbers 1483 (which is the one that questioned the role of solidarism in workers' negotiations), 1780, 1678, 1695, 1781, 1868, 1875, 1879, 1984 and 2024. Most of these had requested the reinstatement of workers. However, "none of them have been reinstated." (ILO. Examination of an individual case related to Convention 98. Session 90. 2002).

A.4.2. Enforcement of the referred cases by sector

Reference to the enforcement of the referred cases as an obstacle to these three specifically cited sectors is a topic that is emblematic of the violation of labor rights in Costa Rica. It represents the shortcomings of the National Office of Labor Inspection (aside from some erroneous or prejudicial views of its functionaries), which contribute to a lack of development of effective law enforcement mechanisms. Although the National Office of Labor Inspection designed an extensive program to carry out periodic controls, which included inspections directed especially at the agricultural sector (rice, oil, sugar and banana) and the industrial sector (textile and construction), that program has been modified in the different Regional Offices, which have substituted focused criteria for labor vulnerability in order to select the workplaces to be inspected according to the availability of resources (Abdallah and Cokyeen 2003).

Multinational Corporations

It is supposed that in general terms, union promoters encounter the same resistance in multinational companies as in national companies. None of the most important and well-known transnational corporations operating in the country have unions, and only a few have workers who are union affiliates (Interview, Luis Serrano).

It has also been maintained that, with relation to the Free Trade Agreement with the United States, many companies (not all of which are transnationals), whose principal capital is North American, are the companies that carry out the most dramatic cases of union repression (Interview, Gilberth Bermúdez).

Public Sector

Entities of the public sector include those that are run by the State, such as the Central Government and the decentralized entities, and others that are not state-run, like the municipalities. The public sector maintains an important presence in union activity; in fact, the most important unions of the country are in this sector.

With respect to the complaints of union persecution in this sector, the statistics distinguish the cases of the decentralized state institutions, where from 1993-2000, a total of 15.1 percent of cases were presented. From the municipal sector came 8.1 percent of the cases from this time period, and 7.5 percent of the total came from the Central Government. Although the statistics are not significant in terms of the number of unions that exist in the public sphere, if you compare them to the number that exist in the private sphere, you will note a very important difference (Abdallah and Cokyeen, 42).

Agricultural Sector

The examples that indicate the effects of union organization in the agricultural sector are demonstrated by the experience of the banana plantations. The following cases illustrate the situation:

- Decrease in collective conventions from 85 in 1980 to 32 in 1991.
- Increase in the absolute number of Solidarity Associations, rising from 862 in 1986 to 1,154 in 1990. There was also an increase in the number of direct agreements between the companies and the associations, from 24 in 1981 to 67 direct agreements in 1987, the same year in which the number of union collective bargaining agreements dropped by almost half.
- By December 2001, in the Atlantic region, 60 percent of organizations were Solidarity Associations (199 were registered), while only 5 percent had unions (17 unions). It is noteworthy that 45 percent of plantations did not have any kind of organization (Diagnostic of Emaús, 2002, table 12, p. 33).
- The weakening of unionism and the control of the workers by Solidarity Associations gave transnational companies room to violate fundamental rights and introduce policies of labor flexibility with no counteracting response by the unions (Banuett 36).

Of the 129 denunciations of union persecution originating in the private sector from 1993-2000, 52 percent were from banana plantations. The denunciations referred to seven problems: the termination of union leadership; the massive firing of union members; the termination of a member; discrimination; harassment and the obstruction of rights or of union duties of union leaders and members, and violation of conventions or other collective agreement (Abdallah and Cokyeen, 42).

The facts denounced are mainly related to unjustified terminations, mostly on banana plantations or in the manufacturing industry, linked to the creation of a new union or affiliation with an existing one.

B. The Right to Collective Bargaining

CENTRAL THEME	National Labor Laws	International Standards / ILO Conventions	Principal Changes Last 5 Years	Parallel Legislations	Obstacles to Enforcement	Examples of Non-Compliance
The Right to Collective Bargaining: *The law regulating the conditions under which labor is lent and the other relevant matters for a group of workers. The force of collective bargaining is in the kind of law that is assigned to it. It applies during negotiations between one or more unions and one ore more employers.*	Political Constitution, Art. 62. Labor Code, Art. 317 and s.s. Executive Decree No. 29576-MTSS. General Law of Public Administration, Articles 111 and 112.	C98 Convention on the Right to Organize and Collective Bargaining, 1949.		*None foreseeable*	Case No. 4453-00 Court IV.	Complaint of SINDEU-SEC and SIPROCIMECA, before the ILO for RESTRICTION ON COLLECTIVE BARGAINING Case 2104 (2001). Jurisprudence of the Constitutional Court denying the right to Collective Bargaining Agreements in the Public Sector.

B.1. RELEVANT NATIONAL LABOR LAWS

B.1.1. Constitutional Laws

Article 62 of the Constitution provides that collective labor agreements agreed upon between employers or employers' associations and legally organized workers' unions have the force of law. The novel character of this institution is that although it is a formal contract between private parties, it is capable of having the effect of law, even for those people who, at the time they became parties to the agreement, are not in a labor relation in the place where the agreement is effectuated.

The most important obstacle for the enforcement of Article 62, however, is the impossibility, determined by erroneous perceptions in the constitutional case law, of negotiating the conditions of employment in public administration. The Court narrowly interpreted Article 192 of the Constitution, which refers to the appointment of public servants and their subordination to the Constitution and to the Civil Service Statute, though this Article does not prohibit collective bargaining of employees in public administration.

B.1.2. Convention-Based laws

Collective bargaining agreements are regulated by ILO Conventions 98, 151, and 154. The only one that Costa Rica has integrated into law is Convention 98, on the Right to Organize and Collective Bargaining. With respect to this Convention, the ILO maintains serious criticisms of the Costa Rican system because of the non-regulation of the public sphere and

for its common practice of authorizing other kinds of negotiation in the private sphere that are not collective bargaining agreements, with sectors that are not unions.

The claims and justifications related to this international instrument are among the most varied that have been presented related to any ILO Convention. After all, it regulates the most controversial topic of all those confronted by modern labor law: the right to organize and collective bargaining.

One of the most controversial aspects in the Costa Rican system surrounds the question of whether collective bargaining agreements are possible in the public sector, or whether public functionaries that do not work in the administration of the State "should enjoy the right to bargain collectively" (International Labor Office, 2002: 391).

B.1.3. National Statutes

Collective bargaining is only regulated in the Costa Rican Labor Code. However, because of the predispositions imposed by Law No. 7360 of 1993 related to the exclusive responsibilities of unions, one must refer to legal sources such as the Organic Law of the Ministry of Labor and Social Security (No. 1869) and the Law of Solidarity Associations (Law No. 6970 of November 7, 1984), which prohibit those associations from participating in such labor negotiations and refers to the role of control that the aforementioned Ministry should carry out with respect to those associations.

The Labor Code is the fundamental legal instrument that regulates collective bargaining. The following table contains the central ideas of each of the articles of this instrument related to the topic, and references to some considerations about the scope and limitations of this right.

LABOR CODE CLAUSES RELATED TO THE RIGHT OF COLLECTIVE BARGAINING			
Art.	Topic	Obstacles to Enforcement	Scope of the Law
10	Exonerates from taxes those contracts and labor agreements, individual or collective, that take place and are executed in the territory of the Republic.		
54	A collective bargaining agreement is one that is made between one or more workers' unions and one or more employers, or one or more employers' associations, with the objective of regulating the conditions under which labor will be lent, and other related matters. It has the character of a professional law and all existing or future individual or collective agreements in the relevant company, industry, or region shall conform to its standards. It is understood that included in this are, at a minimum, all the standards related to labor guarantees established	There is a prejudicial view that collective bargaining is not possible for employees in the public sector. This is incorrect, since labor conditions in all sectors are the product of formal negotiation.	Incorporates the fundamental principle of labor negotiation that any instrument of this type, to be valid, must contain terms superior to the legal minimums and should implement the standards of international conventions.

	in the ILO Conventions that have been ratified by Costa Rica.		
55	Collective bargaining agreements have the status of law for: (a) the signing parties; (b) everyone working at the company at the time the agreement takes effect, even if they are not members of the union party to the agreement; (c) those covered by future individual or collective agreements in the same company may not negotiate less favorable conditions than those contained in the collective agreement.	One characteristic of a negotiation process of an "organization of the employer's influence" is that it never contains conditions superior to the minimum standards.	The Ombudsman of the People (*Defensoría de los Habitantes*) has proposed a bill that would regulate collective bargaining in the public sector and require that the final texts of the agreements be published widely before approval.
56	Any private employer who employs in his or her company the services of more than one third of unionized workers is required to negotiate a collective bargaining agreement with that union when it so requests. The rules to be observed in the process are: (a) the percentage of workers shall be calculated over the total of those who work for the company; (b) if several unions operate within the same company, the collective agreement shall be negotiated with that union having the most workers directly affected by the negotiation; (c) when a company employs workers of different professions or occupations, the collective agreement shall be negotiated with the entirety of the unions representing each one of the professions or occupations; and (d) if thirty days pass after the union requests that the employer negotiate a collective agreement, and the parties have not come to an agreement, any party may request that a Labor Tribunal resolve the point or points of contention.	The anti-union campaigns promoted by employers and tolerated by governmental authorities attempt to undermine broad union participation in the agreements.	
57	Formalities with which the document of the collective agreement must comply.		
58	The elements that collective agreements may cover are: (a) the intensity and quality of the work; (b) the work shift, breaks, and vacations; (c) salaries; (d) professions, occupations, activities and places covered; (e) the duration of the agreement (which cannot be less than one year or more than three) and the day on which it shall take effect. If neither party denounces it, it shall remain in effect.; (f) any other legal stipulations the parties deem appropriate, but no clause shall be valid which requires the employer to renew the contracts of personnel at the request of the workers' union, or any other clause that puts non-unionized workers in a position of manifest inferiority; and (g) the date and place of the execution of the agreement and signatures.	"Rationality and proportionality" of the elements included in the collective bargaining agreement is one of the most difficult balancing tasks of the negotiating process.	Constitutional case law has established that "proportionality and rationality" in the agreed upon aspects is a limitation to including elements in the collective agreement.
59	Once a collective agreement is signed, if the employer separates himself from the union or		

	employers' association that executed the agreement, this will always be in force. In the event of dissolution of the workers' union, or of the employers' association, the rule of Article 53 of the Labor Code shall be followed.		
60	The union that has signed a collective agreement will be responsible for the contracted obligations of each one of its members, and with members' express announcement, it can exercise the rights and actions that correspond to the individual workers as well. It may also exercise the rights and actions that arise from the convention, to ensure compliance, and to obtain compensation for damages and injuries to its own members, other unions that are parties to the agreement, their members, and any other person under obligation by the agreement.	This norm reverts the principle of union legitimation that is strange for issues of representation, because the Code constantly provides that the union may only represent if the member expressly confers power. Here, it imposes an obligation, skipping over the requirement of legitimation that it demands in other cases.	
61	The persons bound by a collective agreement may only exercise the rights and actions that arise out of that agreement, to demand compliance, and to obtain compensation for damages and injuries, against other persons or unions obligated by the agreement, when the failure to comply causes them an individual harm.	This is based on an individualized perception of the effects of an agreement, which in some cases can detract from the credibility of the collective effects that typically characterize such agreements.	
62	When an individual or a union has attempted an action based on a collective agreement, other affected unions may bring suit based on the collective interest of its members in a solution.		This is an exception to legitimation in favor of the unions.
63	Cases foreseen for the extension of the collective agreement to all employers and workers, unionized or not, of a determined branch of the industry, economic activity, or region of the country: (a) that it comply with the formalities of the document; (b) that it is subscribed to by employers who have at their service two-thirds of the workers who in that moment occupy them; (c) that it is subscribed to by the union that comprises two-thirds of the unionized workers who in that moment in the relevant branch of industry, economic activity, or region; (d) that any of the parties send a written request to the Ministry of Labor and Social Security asking that, if the Executive Branch deems it appropriate, it declare its extensive obligatory nature, complying with the formalities of convocation to all the sectors; and (e) once the period of time has elapsed without declared		This takes into consideration the necessary connection that should exist between the labor conditions of similar activities and lines of work.

	opposition, the Executive Branch may issue a decree announcing the obligatory nature of the agreement as long as it does not contravene the laws of public and social interest in effect.		
64	The Executive Branch shall determine a time during which the agreement shall govern, which shall be more than one, but no more than 5 years. This time will be automatically extended if, during the determined time period, no party expresses a desire that the agreement terminate.		
65	Any agreement in effect may be revised by the Ministry of Labor and Social Security if the parties agree and so request.		
340	The principle activities of unions are: (a) to execute collective bargaining agreements and contracts.	In Costa Rica, fewer and fewer collective bargaining agreements are signed every year, while more and more agreements are signed without union participation.	The union is entitled to the right of negotiation.
346	Exclusive attributes of the General Assembly are: (c) to give definitive approval, relating to the union and collective agreements and contracts that the Board of Directors executes.		
370	When a union exists in a company, to which at least half of the workers plus one are affiliated, the employer is prohibited from engaging in any collective bargaining other than with the union.	The excessive number of members needed to trigger this article makes it of little use.	
378	Imposition of sanctions from the Labor Tribunals when they find that the motives of a legal strike are attributable to the employer for the unjustified refusal to execute a collective bargaining agreement.	In practice, employers have countless ways of circumventing this law.	

B.1.4. Other statutes of lesser importance

As a product of the pressures from the international community about the lack of collective bargaining in the public sector, the Government of the Republic issued "Regulations for Collective Bargaining Agreements in the Public Sector," by means of Executive Decree No. 29576-MTSS of May 31, 2001.

The history behind this instrument has to do with a practice often used by the state authorities when they are pressured by international bodies (like the ILO) and must appear before these audiences to explain situations of this nature. Days before the appearance of the governmental delegation to the ILO Assembly in Geneva in 1991, it issued this administrative law, (published in *La Gaceta* [The Gazette] No. 115, June 15, 2001). With this decree, the government avoided the criticism that the country would have received for its lethargy on this topic. The workers' representative said that he knew of said text from a meeting in Geneva in 2001, during Session 89. (ILO. Examination of an individual case related to Convention 98. Session 89, Document 19, 2001). For several years the ILO had

been requiring the country to adopt standards that would resolve the problem of implementing the rights contained in ILO Convention 98 for negotiations in the public sector. The same thing happened that year regarding the references the country had to make on the status of certain bills needed to approve Conventions 151 and 154 of the ILO.

The issuance of legal standards has been a political tool for the government to cut short the criticisms of international organizations. Different governments have always used this type of declaration for the controversial topic of collective bargaining in the public sector to gain respite from having to justify their non-compliance. They have promulgated an Agreement of the Government's Council No. 4 of October 22, 1986, and just as the Regulations for Collective Bargaining Agreements for Public Servants, it was approved by the Government's Council on October 9, 1992 and published in *La Gaceta* on March 5, 1993.

The essential element of the aforementioned "Regulations for Collective Bargaining Agreements in the Public Sector" is that it does not resolve the controversy, as it does not define whom, within the public administration, is permitted to negotiate the agreements, as there are many types of "public servants" subject to various legal regimes.

The Regulations (Executive Decree No. 29576-MTSS of May 31, 2001), however, have suffered a reform, in Executive Decree No. 30582-MTSS of June 17, 2002, which provides for a "Commission of Policies for Collective Bargaining Agreements."

Decree No. 29576-MTSS provides in Article 1 that it applies to Public Companies of the State; to companies belonging to any institution of the State that, according to their rules and requirements, identify as an industrial or commercial company that independently provide economic services under either a monopolistic or competitive regime; and to the workers and employees of the rest of the Public Administration, as long as they do not exercise as their titles, capacity of public law, granted by law or regulation. Article 2 establishes that the following are excluded from the regulation: Ministers, Vice ministers, high-ranking officers, the Attorney General, the Sub-Attorney General, the Controller General, the Subcontroller General, the Ombudsman and Sub-Ombudsman of the People of the Republic; the personnel of the companies or institutions referred to in the previous article, if they serve on the Board of Directors or as Executive President, Executive Director, Managers, Sub-managers, Auditors, Sub-auditors; high-ranking officials of the internal agencies responsible for public income and expenses; personnel of any administration mentioned in the previous article if they are covered by an arbitrator's findings or by another collective bargaining agreement, without harm of being able to negotiate in conformity with the standards here established, once the period of validity of the collective agreements terminates, if it is not extended in accordance with the law or its own terms; and the personnel indicated in Articles 3, 4, and 5 of the Statute of Civil Service, except temporary workers.

Article 3 lists the topics open for negotiation. Article 4 provides that all collective bargaining agreements are subject to constitutional standards for the approval of public budgets (which is implemented as an effective limitation in precept 14 of the Decree), and in point 5 it declares the title of the union as "authorized to negotiation and subscribe to

collective bargaining agreements" and reiterates the rules of Article 56 of the Labor Code. Articles 6-10 refer to different procedural issues.

Article 11 establishes the term of validity of those instruments (from one to three years).

Article 12 creates the Commission of Policies for the Negotiation of Collective Bargaining Agreements in the Public Sector, which is to be integrated into the Ministry of Labor and Social Security or the Vice-Minister of the branch, who will preside over it, the Minister of the Interior or the Vice-Minister, the Minister of the Presidency or the Vice-Minister, the General Director of Civil Service or the temporary substitute, such as a representative of a hierarchical level of the body that is going to negotiate the collective agreement. The following Article, 13, lists the attributes of the Commission, among them a function of political control (taking into account the legal and budgetary possibilities) and the prohibition of the intervention of labor sectors in the determination of their policies.

The Decree "opted for an expansive criteria [for governmental representation] for the right of collective bargaining, excluding from the public sector only the most high-ranking functionaries" and the intention was to elevate it to the rank of law. (ILO. Examination of an individual case related to Convention 98. Session 90, Document 28. 2002). Workers have criticized the instrument for not guaranteeing the terms of Convention 98, because the nature of a decree is that it may be modified at any time (ILO. Examination of an individual case related to Convention 98. Session 89, Document 19. 2001). Workers also argue that it is an example of opportunistic manipulation by the State authorities and was not in fact issued to change anything in the status quo.

In general terms, there are several fundamental obstacles related to this decree that are infractions of Convention 98. The Commission of Policies for the Negotiation of Collective Bargaining Agreements acts (due to its composition) as both judge and party, as it both defines the public policies related to budgetary matters, and carries the unilateral power to limit the scope of the agreements without the parties' agreement on those limits. Of course, budgetary directives do not always coincide with the "public interest," but rather with the "interest of the administration" (Article 113.2, General Law of Public Administration).

B.2. PRINCIPAL CHANGES IN THE LAWS RELATED TO COLLECTIVE BARGAINING IN THE LAST 10 YEARS.

B.2.1. Relevant Statutes

The debate surrounding the treatment of collective bargaining agreements increased in the early 1990s. Discussion centers around two themes: general lack of respect, in both the private and public sector, and its inapplicability to the public sector. Since the early 1990s, the governments have been faced with denunciations for not complying with ILO Convention 98 (ILO Individual Observation on Convention 98. 1998).

This subject should be treated from two angles: that of collective bargaining in the sphere of labor relations in private law and that which arises in public administration.

COLLECTIVE BARGAINING IN PRIVATE LAW

Convention 98 has been discredited in the private sector in Costa Rica. The government has permitted a climate of impunity by tolerating the increase in Solidarity Associations and by not preventing anti-union terminations. All of this has led to an alarming decrease in the number of unions and collective bargaining agreements. In 2000, only 5.24 percent of the workers in Costa Rica's private sector had union protection and representation. If we exclude small agricultural producers, this statistic drops to 2.29 percent.

Despite the fact that the law of *solidarismo* had been reformed in 1993 by Law No. 7360, statistics show that there were 479 direct agreements negotiated in the private sector from 1994-99, while in the same period, only 31 collective bargaining agreements were signed. In contrast, between 1977-81, there were 207 collective bargaining agreements in effect. (ILO Examination of an individual case related to Convention 98. Session 89, Document 19. 2001).

The direct agreements between Permanent Workers' Committees (generally with the participation of "friendly third parties" that belong to, or are very connected to, solidarism), are the tonic of the collective bargaining agreements in Costa Rica, especially in the private sector.

THE ARGUMENT IN FAVOR OF COLLECTIVE BARGAINING IN THE SPHERE OF LABOR RELATIONS IN PRIVATE LAW

In the discussion about whether public employees may carry out collective bargaining agreements, there are three positions. The prevailing argument maintains that it is not possible to submit the terms of public employment relations to negotiation. The second argument accepts that there are certain "untouchable spaces," but contemplates the possibility of collective bargaining agreements because it is illogical to foreclose the possibility that the State, as employer, would not grant its employees a consecrated constitutional right that everyone else has. Finally, the most advanced argument recognizes that all orders at the vanguard of the law conceive of collective bargaining as the determining factor in relations between the State and its functionaries, and are open to several modalities (as is seen in many of the Western European countries). (Marin Quijada, 28-43).

This section will only study the two first theses. The third contains a very serious constitutional question, because of the broad debate that would follow if the administration and those who serve it could negotiate conditions that affect the public treasury or matters of public interest, which *per se* are not subject to negotiation.

THE ARGUMENT AGAINST COLLECTIVE BARGAINING IN THE PUBLIC SECTOR

Constitutional and labor case law do not allow for the possibility that those public employees who participate in the public management of administration may negotiate the

terms of their employment relationship. This argument recognizes that, for those public employees who do not participate in the public management of administration, this possibility does exist, though subject to some limitations (such as budgetary availability and the principle of legality). The delimitation of the subject is based on the following principles:

- The Political Constitution determines in Articles 191 and 192 that a Statute of Civil Service will regulate relations between the State and its public servants.
- The objective of that regulation is to guarantee administrative efficiency.
- It requires that public servants be appointed on the basis of proven suitability and determines that they are not removable except for cause, according to labor legislation.
- It establishes as an exception to the aforementioned the case of forced reduction of services for the reasons referred to therein (economic and reorganization).
- Similarly, there are exceptions to the requirements for the appointment of functionaries and their removal, according to the Constitution and the Statute of Civil Service.
- Administrative law is the law applicable to service relationships between the administration and its public servants.
- Common law (labor or commercial, but not public) governs the service relationships between workers and employees who do not participate in the public management of the Administration (provided in Paragraph 3, Article 111)
- Employees of companies or economic services of the State are not public servants responsible for management subject to common law.
- One who serves the Administration or serves under its name or on its behalf is a public servant, and part of its organization, by virtue of a valid and effective investiture, with complete independence of an imperative, representative, remunerated, permanent or public character of the respective activity.

The evolution of the argument that promotes non-recognition of the right to collective bargaining in the public sector originates in the judgment of the Court of Appeals (*Corte de Casación*) No. 58 of July 1951. Following that, in May 1953 and December 1954, the Statute of Civil Service and its Regulations were promulgated. In interpreting their constitutional and legal contents, the Attorney General of the Republic has repeatedly argued the legal impossibility of collective bargaining. In 1979, the General Law of Public Administration took effect and clearly established that administrative law applies to service relations between the State and those who serve it, insulating that relationship from labor legislation, to which only those public servants who do not participate in public management may resort. It is also mentioned that in 1980 the Government's Council prohibited, in a directive, the execution of collective bargaining agreements in the public sector. Then, in 1986, it authorized a mechanism for the approval of extensions to those collective agreements prior to the General Law of Public Administration. In 1992, this became the "Regulations for Collective Bargaining of Public Servants." The most recent law concerning this topic is the Regulations for Collective Bargaining in the Public Sector, No. 29576-MTSS of May 31, 2001.

The definitive line of argument ends with Judgment No. 1696-92 of the Constitutional Court, which declared direct agreements, conciliation, and arbitration unconstitutional (VSC 2000-7730 Considering IX. Citing Judgment No. 04453-2000. Considering VII). This represents the beginning of the Court's analysis with respect to this topic.

THE ARGUMENT IN FAVOR OF COLLECTIVE BARGAINING IN THE PUBLIC SECTOR FOR GOVERNMENT FUNCTIONARIES WHO DO NOT PARTICIPATE IN PUBLIC ADMINISTRATION.

Based on the reasons outlined above, one can conclude that, in spite of the points made by the prevailing case law, there is nothing that justifies an eventual departure from a law if it contains gaping holes, going far beyond what was envisaged (Ortiz, 185). In this sense, as explained in Ortiz' treatise in the late 1980s (and in spite of the abundant constitutional case law that currently exists on this subject), in this country, no general principle, case law, or written standard exists that states that the legal regime governing the public service relationship represents the maximum legal benefits available to the public servant, or that those benefits cannot be increased by way of Convention-based laws. Article 62 of the Constitution consecrates the right of labor unions to collective bargaining without distinguishing between public and private sector unions. Article 60 establishes the right to form unions, also without distinction by sector. Article 61, however, does make such a distinction, expressly excluding public servants from the right to strike (Ortiz, 185).

It is possible to argue that Article 191 of the Constitution legitimizes the theory that all public functionaries, whether or not they participate in the public management of the administration, can mold their own labor rights (without taking away the statutory configuration governing public employment and with the limitations that ensure the public interest and the principles of public service).

It is obvious that the framers intended that a primarily statutory framework would govern public sector employment relations. But under the banner of "fundamental rights" that characterizes the order proposed by the Constitution (especially after the creation of the Constitutional Court in 1989), the incidence of those rights in regulating the organization of the State and in the relationship of the State to public servants cannot be ignored. It must be interpreted today in light of those rights and their requirements. The interpreter cannot fail to make that observation without petrifying the Constitution, as if nothing has happened since it was enacted (VSC N°04453-2000, Dissenting Opinion of Magistrate Arguedas Ramirez V.)

This is so because these rights are inherent in the human being. Even the case law has said that fundamental rights accompany a person because of his or her nature as a person and that therefore they are above the State itself. The State does not create them, nor does it regulate them; rather it recognizes them, protects them, and guarantees them, but in a purely declarative way. From that point of view, the legal order may protect them and mold their exercise, but it may not eliminate them or fail to recognize them simply by stating that it is required for the organization of the State, administrative efficiency, or some undefined public good. (VSC N°04453-2000, Dissenting Opinion of Magistrate Arguedas Ramirez VII).

One of the essential points related to the subject is the debate over how to define a public employee who "participates in the public management of the administration." This undefined legal concept is mentioned in Article 112 of the General Law of Public Administration and provides that common law, rather than public law, will be applied to the class of employees "that do not participate in the public management of the administration."

This concept is difficult to clarify because the standard is only found in Article 111.1 of the aforementioned law. That Article defines the public servant as one "who serves the Administration or serves under its name or on its behalf is a public servant, and part of its organization, by virtue of a valid and effective investiture, with complete independence of an imperative, representative, remunerated, permanent or public character of the respective activity." Here it is meant to refer to all public employees (which is to say those who "do or do not participate in the public management of the administration"). While commentary on section 2 of the article determines that the terms "public functionary," "public servant," "public employee," "person in charge of the public service," and other similar terms, are equivalent, it only states that the system of relationships will be the same for all of them, unless the nature of the situation indicates the contrary. However, it does not define the aforementioned concept.

The Court has clarified that public employees in charge of management subject to common law, according to Article 112, section 2, are governed by labor law and not by public law (VSC 2000-7730 Considering IX. Citing Judgment No. 04453-2000 Considering IV).

Its definition is fundamental because, as has been established, the system applied to that type of employee of the administration turns on it. The Constitutional Court has determined that it is up to the Administration itself, to the operators of the Law in general, and as a last resort, to a Judge, when they know of specific cases, to determine whether an institution of the State or a group of its servants or functionaries fit within the exception that would allow them to use collective bargaining, or if that option is forbidden to them. (VSC N°2000-7730 Considering IX. Citing Judgment N° 04453-2000 Considering VIII). At any rate, an objective obstacle with respect to this issue is the lack of any law that expressly lays the foundation for granting this power to the hierarchy of the administration to make their own definition.

The Constitutional Court held in 1992 that, as for excluding workers and employees who do not participate in the public management of the Administration, though they are contracted by the State in conformity with the exercise of their capacity in private law (Articles 3.2 and 112.2 and .3 of the General Law of Public Administration), procedures "of resolution of collective conflicts of an economic and social nature" laid out in Articles 497 + in the Labor Code are not applicable for the administrations governed by public employment law. It also held that those procedures are not applicable to the rest of the administrations, including the public-incorporated companies, until the law is amended to address the omissions indicated in this judgment. (Judgment N° 1696-92). *[Trans. note: the original text of this paragraph is very convoluted. You may want to compare this to the original Spanish text].*

In Costa Rica, as has been said, collective bargaining is not possible, but there is an absolute lack of clarity about how to define which public workers are participating in "public management of the administration."

There is a group of public sector employees that does not participate in the public management of the administration, and they may negotiate collective bargaining agreements. This is mentioned in the Regulations for Collective Bargaining Agreements in the Public Sector of 2001. The problem also occurs with relation to a list of forbidden topics that are or could be the subject of negotiation. With respect to this, it has been established that collective bargaining may happen only if it "does not exceed the scope of competence of the administrative body." Of course, this is yet another undetermined legal concept. There will be many debates over how to define it.

In any event, it could be said that next to the related limitations, the framework of the exercise of the right to collective bargaining is related to the principle of legality and the laws of public order that govern the acts of the Administration. It also has to do with budgetary restrictions and the principle of budgetary legality (Article 180 of the Constitution).

That interpretation of Articles 191 and 192 is restrictive in that it founded a system of absolute public employment. It impedes the recognition today of what was once recognized, given that prior to the current Constitution, the rights to unionize, to collective bargaining, and to collective conflicts were recognized in the Constitution of 1871. But assuming that the incorporation of those articles into the current Constitution founded a system of public employment would lead to the conclusion that collective bargaining in the public sector is not accepted as a fundamental right. According to that interpretation of Articles 191 and 192, a public employee must suffer any conditions that the State unilaterally imposes, without the opportunity to participate in or influence the determination of those conditions through negotiation. The sole reason for this would be the public good.

There is no foundation to support the argument that the framers intended to slash the rights of public servants. Article 192 actually reflects the opposite intention. To support the argument above would mean supposing that the current Constitution simply excluded the public sector from the protection of a law that previously had been on the list of rights recognized by the State even as to public servants.

Similarly, there is nothing to indicate that it would have come to this exclusion because of the deliberated purpose of the Convention of 1949 to curtail the coverage of those rights, or to deny their exercise to certain people or public servants. Actually, with regard to the fundamental rights of public servants, it seems that the Convention was motivated by the purpose of protecting their rights, which is inferred in Article 192.

Articles 191 and 192 cannot imply that it is impossible for public sector employees to form part of the definition of their labor regimen.

Those who support that opinion (VSC 04453-2000, Dissenting Opinion of Magistrate Arguedas Ramirez) accept (on principle) that those constitutional articles give a primarily statutory configuration to the system of public employment. This allows the State, through established procedures (that do not exclude *per se* the participation of public servants), to unilaterally impose the conditions of public employment. The justification is to "guarantee the efficiency of public administration." Such decisions, under the authority of the cited Articles, are imposed as an indispensable standard of the legal regimen of employment, which is not subject to substitution, revocation, or alteration by collective bargaining agreements.

> "The law is not extinguished, and it remains possible to achieve a supplementary regulation (not necessarily suppletory) of labor conditions in the spheres, modalities, or aspects that the State unilaterally refrained from adding to the content of the framework of employment law." (VSC 04453-2000 Dissenting Opinion of Magistrate Arguedas Ramirez. XII).

B.2.2. The origin of these laws

COLLECTIVE BARGAINING IN PRIVATE LAW

Problems arise within the system that serve to decrease respect for collective bargaining in this sector.

The problem is very much linked to the precarious situation of unionism in general. The absence of unions, due to repression, creates favorable conditions for the labor legislation mechanisms (direct agreements and Permanent Workers' Committees, for example) to subordinate the right to collective bargaining.

There is no doubt that the real problems are the State's lack of political will to protect the right of union association, and an absolute lack of institutional mechanisms to promote unionization.

COLLECTIVE BARGAINING IN PUBLIC LAW

Different State administrations have been avoiding the subject of finding a solution for the problem of regulating collective bargaining in the public sector. A comment by the ILO indicates that "the government of Costa Rica reiterates in its report for 1996 that the Bill for a Law of the Regimen of Public Employment is before the Legislative Assembly." (ILO Individual observation about Convention 98. 1998).

It is impossible to point to overarching legal standards existing in this time period for two reasons. First, those that have been passed (Accord of Government's Council No. 4 of October 22, 1986 and Regulation of Collective Bargaining for Public Servants of October 9, 1992) have been issued in the framework of creating regulatory standards in an area that has received constant criticism within the system. Furthermore, collective bargaining has

historically been governed exclusively by the provisions of the Labor Code, and it is only because of the Constitutional Court holdings that it has been placed within the framework of public administration. This has created a new era in the treatment of this topic.

The Constitutional Court begins to deal with the difference in legal systems that define the employment relationship between the employees of the Public Administration and public entities with Decision No. 1696-92 of 3:30 p.m. of August 23, 1992. There, it held unconstitutional Articles 368 (the second part) and 497-535 of the Labor Code, as violative of Articles 191 and 192 of the Political Constitution regarding those parts of the public administration with a system of public employment, as is the case of the Institute for Agrarian Development. It also declared Articles 398-404 and 525 of the Labor Code inapplicable (the latter in as much as it contemplates the possibility of a *fallo en conciencia*, not subject to the laws, regulations, and governmental directives), with regard to those public administrations not legally subject to a system of public employment. In sum, this judgment determined that public entities may not execute decisions.

This case law became a recurrent theme in later holdings of the Constitutional Court.[10]

In one of the first judgments regulating collective bargaining agreements for public entities, the Constitutional Chambers, in number 3053-94, recognized that " ... those workers of the J.A.S.E.C. who do not participate in the public management of the administration have the right of recourse to the procedures for the resolution of collective conflicts of a socio-economic nature..." (Chacon, 2)

B.2.3. The consequences of enforcement of these laws for collective bargaining

COLLECTIVE BARGAINING IN PRIVATE LAW

Some of the conditions undermining unionism in Costa Rica are a lack of union promotion, failing to crack down on anti-union activity within the administration, and not permitting unions to represent their members. All of the other aspects relating to the agreements on labor conditions between unions and employers in the private sector are a consequence of a just conceptualization of collective bargaining. Therefore it is very strange that in a system like Costa Rica's, direct agreements are more earnestly promoted in non-unionized entities than the collective bargaining agreements carried out by autonomous workers' organizations.

The only explanation for this reality is found in the different actions taken by entities far removed from unionism, which benefit from the intervention of employers, encouraging them to promote with workers simple negotiations that exclusively favor the employers.

[10] For example, relating to the case presented by the Association of Insurance Agents of the INS related to collective bargaining in the public sector, Case No. 6973-00; the consultation that the Second Chambers would do on the execution of those agreements in the public sector, Case 4453-00; a constitutional challenge presented by the Ombudsman of the People against the Collective Bargaining of RECOPE, Case 7730-00; and another constitutional challenge presented by a functionary of INS against the Collective Bargaining Agreement of that institution, Case 244-01, among others.

One of many documented examples is taken from the case of the "Direct Agreement for Social Responsibility, Quality, Productivity, Competition, and Environmental Protection of the Estibadora Caribe, S.A. and its Workers (Collaborators)," 2001.

This situation became exemplary because it has many of the characteristics indicating a motivation contrary to the principle of workers' autonomy. In this case, the document of the "Direct Agreement," presented to the DNI, was rejected by the ministerial agency because it did not provide conditions superior to those granted by law.

In response to this specific argument (which was easy to confirm by simply reading the text of the instrument), the workers and the company management surprisingly attached a new document, stating, "Through an involuntary error, the original document was not delivered" which provides "other negotiated benefits."

Those contracted benefits that were not included in the first document include a company doctor; delivery of uniforms; contributions to the Solidarity Association; a Christmas party financed by the company, up to 1 million colones (or approximately US $2300) (Trans. note); and travel stipends.

As can be inferred, those benefits not originally included do not significantly enhance the labor conditions, as they consist in granting some rights that only barely exceed the legal minimum, and include contributions to the Solidarity Association.

The appeal submitted on the DNI's initial decision states that notification to both parties (labor and management) should be sent to the same fax number.

Finally, in the Direct Agreement, a representative of the Solidarity Association participated as a "friendly third party."

The conditions of the negotiations between workers and business owners implemented by the Direct Agreement are characterized by the following:

- Reference in the text of the "Direct Agreement" to labor minimums;
- Surprising addition of an addendum substantially modifying the original text in the event of a rejection of the negotiated document;
- Grants benefits to the Solidarity Association of the company;
- Allowing the representatives of the Solidarity Association participate as "friendly third parties";
- Using the employers' lawyers address as the technical legal address, or at the very least, confusing the two parties when sending notification; and
- Negotiated by "Permanent Workers' Committees," whose signatures of support do not indicate that there was a clear understanding by the signers that a union could have negotiated the agreement.

COLLECTIVE BARGAINING IN PUBLIC LAW

In very general terms, the Constitutional Chambers has expressed that collective bargaining in the public sector is not possible. But it is recognized that there is a complete lack of clarity as to the definition of who may negotiate these agreements, as there are several types of "Public Servant," to whom different legal regimes apply. For example, Article 111 of the General Law of Public Administration says that a public servant is one "who serves the Administration or serves under its name or on its behalf is a public servant, and part of its organization, by virtue of a valid and effective investiture, with complete independence of an imperative, representative, remunerated, permanent or public character of the respective activity." But, creating a special category of "public functionary," Article 112.2 (after observing in its first section that public law shall prevail in relations between the administration and its servants) says: "the service relationships with workers and employees who do not participate in the public management of the Administration, in accordance with paragraph 3 of Article 111, shall be governed by labor law, or commercial law, depending on the case." So the law to be applied depends on whether one participates in the public management of the Administration.

There is no legal decision that recovers the possibility that public employees could consent to negotiate collectively. But defining whom the statute covers cannot be left to the administration. A bill that would regulate this matter (Record No. 14,675) does not have solid support in the Legislative Branch.

The supposed intervention of the Ombudsman in collective bargaining processes has been criticized because of the actions he has brought before the constitutional court against public entities. An example of a case of concern is a clause in the Collective Agreement of the Board of Port Administration and Economic Development of the Atlantic Coast (JAPDEVA) and its union (SITRAJAP), which provided:

> "That union leaders who work according to a time card, list, shift, etc, will have their overtime cancelled by JAPDEVA in accordance to what his block or section earns; likewise for bonuses in cases where that benefit is received."

The Ombudsman has said that "Collective Bargaining Agreements are the ideal way to improve labor conditions," but has criticized clauses that show up in some instruments negotiated by public companies, which "have been unable to justify the existence of irrational privileges." (DHR Report, 2002-03).

This campaign to discredit collective bargaining agreements has recently affected the agreement at Japdeva:

In the decision issued in December 2003, the Treasury Secretary improbando costs stipulated in the collective bargaining agreement of the Junta de Administración Portuaria y de Desarrollo Económico de la Vertiente Atlántica (Japdeva). This decision was based on criteria of the authority that regulates public services, Aresep, which said that expenses of